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No. 94-12-CFX
Status: GRANTED

Title: Seminole Tribe of Florida, Petitioner
v.
Florida, et al.

Docketed:
July 1, 1994

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Rogow,Bruce S.

Counsel for respondent: Glogau,Jonathan A., Solicitor General

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Entry	Date	Note	Proceedings and Orders
1	Jul 1 1994	G	Petition for writ of certiorari filed.
2	Jul 1 1994		Appendix of petitioner filed.
3	Jul 26 1994		Brief of respondents Florida, et al. in opposition filed.
4	Jul 28 1994		Brief amici curiae of California, et al. filed.
5	Sep 7 1994		DISTRIBUTED. September 26, 1994 (Page 145)
6	Sep 16 1994	X	Supplemental brief of petitioner filed.
7	Oct 3 1994	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
8	Dec 30 1994		Brief amicus curiae of United States filed. VIDED.
9	Jan 4 1995		REDISTRIBUTED. January 20, 1995 (Page 1)
10	Jan 18 1995	X	Supplemental brief of United States filed. VIDED.
12	Jan 23 1995		Petition GRANTED.
			**********
14	Feb 2 1995		Order extending time to file brief of petitioner on the merits until March 31, 1995.
15	Mar 31 1995		Joint appendix filed.
16	Mar 31 1995		Brief of petitioner Seminole Tribe of Florida filed.
17	Mar 31 1995		Brief amicus curiae of United States filed.
18	Mar 31 1995		Brief amici curiae of Spokane Tribe of Indians, et al. filed.
19	Mar 31 1995		Brief amici curiae of Poarch Band of Creek Indians, et al. filed.
20	Mar 31 1995		Brief amici curiae of Stockbridge-Munsee Indian Community, et al. filed.
21	Mar 31 1995		Brief amici curiae of Tohono O'Odham Nation, et al. filed.
22	Mar 31 1995		Brief amici curiae of National Indian Gaming Association, et al. filed.
23	Mar 31 1995		Brief amicus curiae of Miccosukee Tribe of Indians of Florida filed.
24	Mar 31 1995		Brief amici curiae of San Manuel Band of Mission Indians, et al. filed.
28	Apr 14 1995	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
25	May 3 1995		Brief amici curiae of National Governors' Association, et al. filed.
26	May 3 1995		Brief amici curiae of California, et al. filed.
27	May 3 1995		Brief of respondents Florida, et al. filed.
29	May 16 1995	G	Application (A94-876) to extend the time to file a reply

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No. 94-12-CFX

Entry	Date	Note	Proceedings and Orders
			brief from June 5, 1995 to June 16, 1995 by petitioner Seminole Tribe of Florida, submitted to Justice Kennedy.
31	May 17 1995		Application (A94-876) granted by Justice Kennedy extending the time to file until June 17, 1995.
32	May 22 1995		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. e 17, 1995.
33	Jun 17 1995		Reply brief of petitioner filed.
34	Aug 1 1995		SET FOR ARGUMENT WEDNESDAY, OCTOBER 11, 1995. (3ND CASE)
35	Aug 4 1995		CIRCULATED.
36	Aug 11 1995		Record filed.
		*	Record proceedings U.S. Court of Appeals, Eleventh Circuit and U.S.District Court,So. Dist. Fla. (BOX)
37	Aug 11 1995		(Also, includes the record in 94-35).
38	Oct 11 1995		ARGUED.

(1)
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No. 94-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

v.

STATE OF FLORIDA, and LAWTON CHILES,
Governor of Florida,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against states for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution?

II.

Does the *Ex parte Young* doctrine permit suits against a state governor for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution?

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OCTOBER TERM, 1994

No. ———

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

v.

STATE OF FLORIDA, and LAWTON CHILES,
Governor of Florida,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Seminole Tribe of Florida, is a federally recognized Indian Tribe. The Seminole Tribe seeks certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit which held that Congress lacked the power to abrogate state Eleventh Amendment immunity under the Indian Commerce Clause.

OPINIONS BELOW

The opinion and judgment of the Eleventh Circuit, entered on January 18, 1994, is reported at 11 F.3d 1016 (11th Cir. 1994) and is reprinted in the Appendix at pages 1a-25a. The State of Florida's Motion for Rehearing was denied without comment on April 6, 1994. App.

86a. The order of the United States District Court for the Southern District of Florida, entered on June 18, 1992, denying the State of Florida's Motion to Dismiss, is reported at 801 F. Supp. 655, and is reprinted in the Appendix at pages 26a-42a. The district court's order on summary judgment motions, entered on September 22, 1993, reprinted in the Appendix at pages 43a-83a, is on appeal to the United States Court of Appeals for the Eleventh Circuit, but that appeal has been stayed pending disposition of proceedings in this Court. Order of April 28, 1994; (App. 84a-85a).

STATEMENT OF JURISDICTION

The judgment and opinion of the Eleventh Circuit were entered on January 18, 1994. App. 1a. On April 6, 1994, the Eleventh Circuit denied the State of Florida's petition for rehearing and suggestion for rehearing *en banc*. App. 86a. The petition for certiorari is being filed within 90 days of that denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

The Commerce Clause, U.S. Const. art. I, § 8, cl. 3:

> The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATUTES

Section 2710(d)(7) of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, provides:

> (A) The United States district courts shall have jurisdiction over—
>
> > (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith. . . .
>
> . . . .
>
> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

Section 2710, the portion of the statute relevant to this case, is reprinted in full in the Appendix at pages 87a-100a.

STATEMENT OF THE CASE

The Seminole Tribe of Florida sued the State of Florida and its Governor on September 19, 1991, asserting jurisdiction primarily under 25 U.S.C. § 2710(d)(7)(A)(i); (App. 97a). The essence of the suit was that the State and the Governor had "failed to respond in good faith to the Tribe's request for compact negotiations and have not conducted those negotiations in good faith." Compl. at ¶ 24.

The Indian Gaming Regulatory Act ("IGRA"), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166-1168), requires Indian Tribes to compact with a state in order to conduct class III gaming—gaming that is neither social or traditional class I gaming, nor within the various bingo, pull tab and card games which are authorized as class II gaming under the statute. Class III gaming on Indian lands

is lawful if authorized by a tribe located in a state that permits such gaming, and "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ." § 2710(d)(1); (App. 93a). Congress provided a remedy if the Tribal-State compact negotiations fail to achieve an accord:

> (A) The United States district courts shall have jurisdiction over—
>
> > (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith. . . .
>
> . . . .
>
> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

§ 2710(d)(7)(A)(i) & (B)(i); (App. 97a).

The Seminole Tribe sued the State of Florida and its Governor pursuant to Congress' jurisdictional mandate and 28 U.S.C. § 1331 (federal question jurisdiction). The State and the Governor moved to dismiss on Eleventh Amendment sovereign immunity grounds. The district court denied their motions, *Seminole Tribe of Florida v. Florida*, 801 F. Supp. 655 (S.D. Fla. 1992); (App. 26a-42a), stating:

> Given Congress' plenary authority over Indian relations, explicitly noted in the text of the Constitution at Article I, § 8, cl. 3, and the uniquely federal issues raised when such authority is exercised, considered in conjunction with the principles enunciated by the Supreme Court in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), we conclude that Congress, when acting pursuant to the Indian Commerce Clause, has the power to abrogate the States' immunity.

801 F. Supp. at 658; (App. 32a).

The State and the Governor appealed to the Eleventh Circuit.[1] The *Seminole* case was consolidated with *Poarch Creek Indians v. Alabama*, No. 92-6244. In that case, the district court had granted the State's and the Governor's Eleventh Amendment motions to dismiss. The Eleventh Circuit reversed the *Seminole* decision and affirmed the *Poarch Creek* decision, concluding that the Indian Commerce Clause did not provide Congress with the power to abrogate the State's Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1028-29 (11th Cir. 1994); (App. 22a, 25a).

The Eleventh Circuit found that Congress clearly "manifested its intent to abrogate the states' immunity" under IGRA. 11 F.3d at 1024; (App. 14a). The court held "that Congress enacted IGRA solely under the Indian Commerce Clause," but then concluded that the Indian Commerce Clause does not permit Eleventh Amendment abrogation. 11 F.3d at 1026; (App. 18a). The court's rationale rejected the relevance of *Pennsylvania v. Union Gas Co.*, 401 U.S. 1 (1989), questioning its viability and drawing a distinction between Congress' powers under the Interstate Commerce Clause (*Union Gas*) and the Indian Commerce Clause. 11 F.3d at 1026-28; (App. 18a-22a).

The court of appeals noted that its conclusion regarding Congress' Eleventh Amendment abrogation power con-

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[1] Jurisdiction in the court of appeals was based upon the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). *See Griesel v. Hamlin*, 963 F.2d 338 (11th Cir. 1992) (denial of Eleventh Amendment immunity is an immediately appealable order); *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, —— U.S. ——, 113 S.Ct. 684 (1993) (collateral order doctrine permits immediate appellate review of orders denying claim of Eleventh Amendment immunity).

flicted with the Eighth Circuit decision in *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993) (11 F.3d at 1023, n.5; App. 12a, n.5), and noted the conflict among district courts on the same issues. 11 F.3d at 1024, nn. 6 and 7; (App. 13a, nn. 6 and 7).

The Eleventh Circuit also rejected application of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to the Seminoles' suit against the Governor of Florida. The court concluded that the suit was really against the state itself, making *Ex parte Young* inapplicable, and that a decision to negotiate with a tribe is a "discretionary act" outside the mandate of *Ex parte Young*. 11 F.3d at 1028-29; (App. 23a-24a).

After rejecting all bases for federal jurisdiction under IGRA's aegis, the court of appeals created a remedy "for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit." 11 F.3d at 1029; (App. 25a). The court's remedy was that the tribe can notify the Secretary of the Interior of the state's failure to negotiate and objection to jurisdiction, and "[t]he Secretary then may prescribe regulations governing class III gaming on the tribe's lands." *Id.* That remedy prompted Florida's Motion for Rehearing, despite its Eleventh Circuit Eleventh Amendment success. Rehearing was denied. Order of April 6, 1994; (App. 86a).

This petition for certiorari seeks review of the court of appeals' decision which precluded the Seminole Tribe from asserting federal court jurisdiction over Florida and its Governor for not negotiating in good faith as required by the Indian Gaming Regulatory Act.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW EXPRESSLY CONFLICTS WITH THE DECISION OF THE EIGHTH CIRCUIT IN *CHEYENNE RIVER SIOUX TRIBE v. SOUTH DAKOTA*, 3 F.3d 273 (8th Cir. 1993), AND PRESENTS THE IMPORTANT AND UNANSWERED QUESTION OF CONGRESS' POWER TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY UNDER THE INDIAN COMMERCE CLAUSE

The Eleventh Circuit was unequivocal:

> We hold that, although decisions of the Supreme Court demonstrate that Congress does possess the power to abrogate the states' Eleventh Amendment sovereign immunity in certain cases, Congress did not possess that power when enacting IGRA under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3.

11 F.3d at 1019; (App. 2a).

> Having determined that Congress enacted IGRA solely under the Indian Commerce Clause, we now must determine whether the Indian Commerce Clause permits Congress to abrogate the states' Eleventh Amendment immunity. We conclude that it does not.

11 F.3d at 1026; (App. 18a).

The Eleventh Circuit acknowledged there was no doubt Congress intended to abrogate the State's immunity, but concluded:

> That intent cannot be given effect, however, as Congress did not possess the power to abrogate the states' immunity when it enacted IGRA.

11 F.3d 1024; (App. 14a).

The court of appeals acknowledged that this Court has not yet addressed the abrogation power in the context of legislation enacted pursuant to the Indian Commerce Clause. It recognized that section 5 of the Fourteenth Amendment and the plenary power over Interstate Com-

merce, article I, section 8, clause 3, provide a basis for abrogation, citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989),

> [but] [t]he Court has not yet found that Congress possesses the power to abrogate the states' sovereign immunity when legislating under any other provisions of the Constitution.

11 F.3d at 1023; (App. 13a).

This case presents the Court, under the Constitution's Indian Commerce Clause, with that important, but unanswered question. The importance of the question is underscored by the historically sensitive nature of the relationship between the federal government and Indian tribes, and by Congress' attempts to address conflicts between states and tribes pursuant to its plenary power to regulate commerce with the Indian tribes under article I, section 8, clause 3 of the Constitution. The Indian Gaming Regulatory Act is a quintessential example of Congress' delicate balancing to accommodate the rights and needs of tribes and states. The Act was prompted by *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which left Indian gaming unregulated:

> In an attempt to supply some much-needed regulation, and after contentious debate concerning the appropriate state role in the regulation of Indian gaming, Congress enacted the Indian Gaming Regulatory Act.

11 F.3d at 1019; (App. 3a).

Survival of the Act's central promise to the tribes—a remedy for a state's failure to engage in good faith negotiations—will resolve constitutional, statutory, and conflicting decisional doubts. *Compare Kickapoo Tribe of Indians v. Kansas*, 818 F. Supp. 1423 (D. Kan. 1993) (IGRA abrogates Eleventh Amendment immunity), with *Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 800 F. Supp. 1484 (W.D. Mich. 1992); *Ponca Tribe of*

Oklahoma v. Oklahoma, 834 F. Supp. 1341 (W.D. Okla. 1992); *Spokane Tribe of Indians v. Washington*, 790 F. Supp. 1057 (E.D. Wash. 1991) (no Eleventh Amendment abrogation under Indian Commerce Clause). The Eleventh Circuit expressly acknowledged its conflict with the Eighth Circuit on the IGRA abrogation issue:

> One sister circuit, in determining that the Eleventh Amendment did not bar suits under IGRA, mentioned that the state had "actively engaged in negotiating tribal-State compacts and ha[d] reaped the benefits from these negotiations." *See Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273, 281 (8th Cir. 1993) ("Cheyenne II"), *aff'g* 830 F. Supp. 523 (D.S.D. 1993) ("Cheyenne I"). As the Eighth Circuit Court of Appeals primarily rested its decision on the fact that Congress had abrogated the state's Eleventh Amendment immunity, an argument we discuss (and reject) in part III.B., below, it is not clear how much weight the court gave to the state's participation in negotiations. To the extent that the Eighth Circuit relied on South Dakota's negotiations as a basis for finding a waiver of sovereign immunity, we respectfully disagree.

11 F.3d at 1023, n.5; (App. 12a, n.5). That continuing federal court controversy over IGRA and the Eleventh Amendment is another reason for granting certiorari.

The decision below unequivocally presents important constitutional issues. Review, and resolution of those issues, will also provide direction and stability to Indian tribes throughout the nation seeking to benefit from Congress' primary purpose in enacting IGRA:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

25 U.S.C. § 2702(1).

For all those reasons, certiorari should be granted.

II. THE DECISION BELOW PRESENTS A CONFLICT IN PRINCIPLE WITH *PENNSYLVANIA v. UNION GAS CO.*, 491 U.S. 1 (1989)

The decision below found *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), to be the case "most relevant" to the issue of whether the Indian Commerce Clause "permits Congress to abrogate the states' Eleventh Amendment immunity." 11 F.3d at 1026; (App. 18a). The *Union Gas* plurality concluded that since the Commerce Clause:

> withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not "unconsenting"; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.

491 U.S. at 19-20.

The decision below rejected *Union Gas*, distinguishing it as only applicable to the Interstate Commerce Clause, not the Indian Commerce Clause. Neither *Union Gas* nor the language of the Commerce Clause suggests that the ratification analysis permits interstate and Indian commerce to be treated differently for Eleventh Amendment abrogation purposes. Although the clauses "have very different applications," *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), the difference favors abrogation under the Indian Commerce Clause.

The Interstate Commerce Clause allows Congress to limit state action to maintain free trade among the states. *Id.* "[T]he central function of the Indian Commerce

Clause is to provide Congress with *plenary* power to legislate in the field of Indian affairs." *Id.* (emphasis added) (citations omitted). The states' acceptance of Congress' plenary power in Indian affairs lends more, not less strength to the Seminole Tribe's argument that Congress, in IGRA, had the power to abrogate Eleventh Amendment immunity. Through the Indian Commerce Clause, the States relinquished all authority over Indian affairs to the federal government. Thus, the central government exercises not only plenary, but exclusive authority over Indian affairs, sufficient to empower Congress to abrogate the States' Eleventh Amendment immunity. *Union Gas* is consistent with that claim. The decision below conflicts with *Union Gas*. That is an independent basis for granting certiorari.[2]

III. THE DECISION BELOW CONFLICTS WITH *EX PARTE YOUNG*, 209 U.S. 123 (1908), OR PRESENTS AN IMPORTANT UNANSWERED QUESTION UNDER THAT DOCTRINE

The *Ex parte Young* fiction permits an injunction against a state officer to force compliance with federal law. The Seminole Tribe's suit against the Governor of Florida—the State official deemed responsible for negotiating an Indian Gaming Regulatory Act compact—invokes the doctrine.

The Act creates a cause of action and federal court jurisdiction for "failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A)(i); (App. 97a). Once the Governor admits he is "the State" for compact negotiation purposes, he, like Attorney General Young, becomes a defendant whose presence vitiates Eleventh Amendment

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[2] The court of appeals' doubts about the continued viability of *Union Gas* permeated its opinion. We submit that these doubts need not be resolved under the construct we posit, because the Indian Commerce Clause provides surer footing for abrogation than does the Interstate Commerce Clause.

problems. Therefore, the court may order him to cease illegal actions—i.e., his continuing refusal to negotiate in good faith. *See* 209 U.S. at 155-56.

The court below held the *Ex parte Young* doctrine inapplicable because it incorrectly believed that how and whether to negotiate is subject to gubernatorial discretion. 11 F.3d at 1028-29; (App. 23a-24a). But IGRA allows the Governor no such discretion. The Act provides that upon receiving a compact request, "the State *shall* negotiate with the Indian tribe in good faith . . . ." 25 U.S.C. § 2710(d)(3)(A) (emphasis added). The court was not asked to compel the Governor to exercise any discretion, but only to determine, in light of the present factual record, whether his behavior complied with IGRA requirements.

The lower court's analysis thus fails to address the relief authorized by IGRA and sought below: a ruling that the State has not negotiated in good faith and an order that it do so. 25 U.S.C. § 2710(d)(7)(B)(iii); (App. 98a). If a governor still refuses to participate in good faith negotiations, then IGRA remedies can proceed under the authority granted to the Secretary of the Interior. The process requires no further participation by either a state or its governor. 25 U.S.C. § 2710(d)(7)(B)(iv)-(vii); (App. 98a-99a).

Moreover, contrary to the Eleventh Circuit's conclusion (11 F.3d at 1029; App. 24a), the Governor is the proper defendant. The Florida Governor's authority, as the State's chief executive officer, to conduct compact negotiations with the Seminole Tribe is unquestioned.

Congress' plenary constitutional power to compel states to cooperate with tribes imposes a duty upon a state and its officials that arises from the states' duty to conform to the Constitution. *Ex parte Young* provides the basis for enforcing that duty by suing the responsible state official in federal court. 209 U.S. at 159. It similarly provides the basis for enforcing a state's duty to abide by

Congress' mandate under the Indian Commerce Clause of the Constitution. If *Ex parte Young* does so provide, the decision below conflicts with that doctrine, and the lower court should have provided the relief contemplated by IGRA. If the application of *Ex parte Young* in this context is not clear, this case presents an important unsettled question of the ability of the federal courts to provide the relief contemplated by the Indian Gaming Regulatory Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 92-4652, 92-6244

SEMINOLE TRIBE OF FLORIDA,
Plaintiff-Appellee,

v.

STATE OF FLORIDA, LAWTON CHILES,
Governor of the State of Florida,
Defendants-Appellants.

POARCH CREEK INDIANS,
POARCH BAND OF CREEK INDIANS,
Plaintiff-Appellant,

v.

STATE OF ALABAMA, JAMES E. FOLSOM,
Governor, State of Alabama,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Appeal from the United States District Court
for the Southern District of Alabama

Jan. 18, 1994

Before TJOFLAT, Chief Judge, BLACK, Circuit Judge, and JOHNSON, Senior Circuit Judge.

TJOFLAT, Chief Judge:

These two consolidated cases present the following issue: whether Congress successfully abrogated the states' Eleventh Amendment sovereign immunity from suit by enacting the Indian Gaming Regulatory Act ("IGRA"), Pub.L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-21).[1] The two district court judges below agreed that IGRA manifested Congress' attempt to abrogate the states' Eleventh Amendment immunity; they disagreed, however, as to whether Congress possesses the power under the Constitution to accomplish that abrogation.

We hold that, although decisions of the Supreme Court demonstrate that Congress does possess the power to abrogate the states' Eleventh Amendment sovereign immunity in certain cases, Congress did not possess that power when enacting IGRA under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3. Thus, the states retain their sovereign immunity and the federal courts do not have subject-matter jurisdiction over suits brought under IGRA. Accordingly, these cases must be dismissed.

In part I, we provide a brief summary of the Indian Gaming Regulatory Act here at issue. In part II, we set forth the facts relevant to these cases. After establishing our jurisdiction and the appropriate standard of review in part III, we examine the Eleventh Amendment issues in part IV and then analyze the effect of our holding in part V.[2]

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[1] Unless so indicated, all cited sections refer to Title 25 of the United States Code.

[2] Defendants raise one issue for the first time on appeal: the Tenth Amendment. Citing the Supreme Court's decision in *New York v. United States*, —— U.S. ——, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), in which the Court held that Congress could not coercively interfere with the reserved powers of the states, defendants contend that IGRA coercively forces the states to negotiate with Indian tribes in violation of the Tenth Amendment.

"It is not the practice of this court to consider issues on appeal that were not raised in the district court." *Allen v. Alabama*, 728 F.2d 1384, 1387 (11th Cir. 1984); *Moore v. Morgan*, 922 F.2d 1553, 1556 n. 3 (11th Cir. 1991). Accordingly, we decline to address defendants' contention.

I.

In 1987, the Supreme Court held that a state could not enforce its "civil/regulatory" gaming laws in a manner that would prohibit gaming on Indian lands within its borders. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). That decision left Indian gaming largely unregulated by the states; similarly, "existing federal law d[id] not provide clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. § 2701(3). In an attempt to supply some much-needed regulation, and after contentious debate concerning the appropriate state role in the regulation of Indian gaming, Congress enacted the Indian Gaming Regulatory Act. IGRA's primary purpose was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." § 2702(1). In order to accomplish this goal, Congress defined classes of Indian gaming, § 2703(6)-(8); established the National Indian Gaming Commission to monitor and regulate some forms of Indian gaming, §§ 2704-08; and provided a compacting procedure by which states might participate in the regulation of certain forms of Indian gaming, § 2710(d).

Briefly summarized, Congress divided Indian gaming into three "classes." Class I gaming, which is governed and regulated solely by individual Indian tribes, includes little more than "social games solely for prizes of minimal value. . . ." § 2703(6). Class II gaming, which is subject to certain federal regulations, includes bingo and

comparable games as well as non-banking card games where not prohibited by state law.[a] § 2703(7)(A). Neither of these classes is relevant to the cases on appeal.

These cases address the third class of gaming. Class III gaming is defined residually; it includes "all forms of gaming that are not class I gaming or class II gaming." § 2703(8). Specifically excluded from class II, and therefore within the parameters of class III, are banking card games and "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." § 2703(7)(B). Class III gaming is the type of gaming most profitable to the tribes; it also is the gaming in which the states desire the greatest regulatory oversight.

In order to achieve a compromise between the interests of the states and the interests of the Indian tribes, Congress mandated that class III gaming activities would be lawful on Indian lands only when those activities are (a) authorized by the tribe; (b) located in a state that permits such gaming; and, most importantly, (c) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect." § 2710(d)(1). To ensure that dilatory actions by the state could not preclude or unreasonably delay Indian gaming, IGRA also delineated a negotiating process designed to culminate in the Tribal-State compact and provided mechanisms to remedy state misconduct.

Under the statute, the tribe initiates the compacting process by requesting that the state enter into negotiations for the purpose of concluding a Tribal-State compact governing the conduct of gaming activities; in IGRA, Congress mandated that the state "shall negotiate with the Indian tribe in good faith to enter into a compact." §2710 (d)(3)(A). If these negotiations bear fruit, the compact must be approved by the Secretary of the Interior and published in the Federal Register. § 2710(d)(8).

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[a] Non-banking card games are those in which the gamblers compete against each other rather than against the house.

Congress also anticipated that Tribal-State negotiations would not always produce a mutually satisfactory compact; it thus provided tribes with a remedy in the federal courts:

> (A) The United States district courts shall have jurisdiction over—
>
> > (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith. . . .
> >
> > . . . .
>
> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

§ 2710(d)(7)(A)(i) & (B)(i). If the district court finds that the state indeed has failed to negotiate in good faith, that court "shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." § 2710(d)(7)(B)(iii). If that fails, "the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact." § 2710(d)(7)(B)(iv). The mediator then selects the better of the two proposals and submits it to the tribe and the state. The state then either may consent to the compact within sixty days, in which case the compact is treated as if it were the product of negotiations; or may refuse to consent, in which case the Secretary of the Interior provides procedures to regulate the tribe's class III gaming. § 2710(d)(7)(B)(vi) & (vii).

Defendants in these two cases assert that the federal jurisdiction granted by § 2710(d)(7) is contrary to their

Eleventh Amendment sovereign immunity and demand that the tribes' cases be dismissed.

II.

The facts of these cases are few and easily summarized. The first case, *Seminole Tribe of Florida v. Florida*, No. 92-4652, was filed by the Seminole Tribe, federally recognized as a tribe under Section 16 of the Indian Reorganization Act, 25 U.S.C.A. § 476 (West 1983 & Supp. 1993). The complaint, filed in the Southern District of Florida on September 19, 1991, asserted jurisdiction largely under 25 U.S.C. § 2710(d)(7)(A)(i) and alleged that the State of Florida and its governor, Lawton Chiles, had "failed to respond in good faith to the Tribe's request for compact negotiations and have not conducted those negotiations in good faith." Defendants moved to dismiss the complaint for lack of subject-matter jurisdiction based on the sovereign immunity enjoyed by the State of Florida and the Governor of Florida under the Eleventh Amendment. On June 18, 1992, the district court denied the motion, 801 F. Supp. 655 (S.D. Fla. 1992) ("*Seminole*"), and this interlocutory appeal ensued.

The second case, *Poarch Band of Creek Indians v. Alabama*, No. 92-6244, presents a similar initial fact pattern. The Poarch Band, also a federally recognized tribe, filed suit against the State of Alabama and its governor, Guy Hunt (for whom the current governor, James E. Folsom, Jr., has been substituted), on September 11, 1991. Also asserting jurisdiction largely under 25 U.S.C. § 2710(d)(7)(A)(i), the complaint is designed to resolve for the State and the Tribe various questions regarding IGRA's definition of class III gaming. The State of Alabama's answer claimed a defense of sovereign immunity under the Eleventh Amendment; the district court granted the State's subsequent motion to dismiss based upon this defense on October 30, 1991. 776 F. Supp. 550

(S.D. Ala. 1991) ("*Poarch I*").[4] The governor also filed an Eleventh-Amendment-based motion to dismiss; the district court granted it on February 20, 1992, thus dismissing the final defendant and terminating the Poarch Band's suit. 784 F. Supp. 1549 (S.D. Ala. 1992) ("*Poarch II*"). It is from these orders that the Poarch Band appeals.

III.

We have jurisdiction over these consolidated cases pursuant to 28 U.S.C. § 1291. In *Poarch I* and *Poarch II*, the district court granted defendants' sovereign-immunity-based motions to dismiss, thus terminating the tribe's suit and giving rise to our appellate jurisdiction over final orders. Our jurisdiction in *Seminole* arises from the district court's *denial* of defendants' motion to dismiss based on sovereign immunity; such a denial grants defendants the right of an immediate, interlocutory appeal. *See Griesel v. Hamlin*, 963 F.2d 338, 340 (11th Cir. 1992).

The granting or denial of a sovereign immunity defense is an issue of law subject to *de novo* review by this court. *McDonald v. Hillsborough County School Bd.*, 821 F.2d 1563, 1554 (11th Cir. 1987).

IV.

For more than a century, judicial interpretation of the Eleventh Amendment has far exceeded the apparent scope of the amendment's actual provisions. The scope of the "textual" amendment is rather limited and serves only to restrict the Article III diversity jurisdiction of the federal courts:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

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[4] The district court dismissed the State of Alabama from the Poarch Band's amended complaint in an unpublished order dated January 24, 1992.

States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

In 1890, however, the Supreme Court rejected this facial reading. In *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed.2d 842 (1890), the Court recognized that the Eleventh Amendment "reflected . . . a consensus that the doctrine of sovereign immunity, for States as well as for the Federal Government, was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 31-32, 109 S.Ct. 2273, 2297, 105 L.Ed.2d 1 (1989) (Scalia, J., concurring in part and dissenting in part). Thus, the Court determined that the principle of sovereign immunity, although omitted from the text of the Constitution, survived the Constitutional Convention.

It did not survive untarnished, however; the Court subsequently has held that the states' immunity is not absolute. More specifically, the states are not immune from suit if the circumstances indicate consent, abrogation, or the fiction of *Ex parte Young.* If none of these three exceptions applies, however, the Eleventh Amendment serves as a jurisdictional bar to the suit. *See Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). We address each exception to Eleventh Amendment immunity in turn.

A.

First, the Supreme Court has held that the states may not rely on the defense of sovereign immunity if they have consented to suit. A court may find consent in three circumstances. The clearest of the three, known as express consent, usually takes the form of legislative enactment. The second form of consent derives from the states' ratification of the Constitution. This "plan of the convention" consent assumes that, by ratifying the Constitution and joining the republic, each state ceded certain powers to the federal system; implicit in this cession is the understanding that the state necessarily also consented to suit in certain cases. Thus, the Court has held that, by ratifying the Constitution, the states waived their immunity to suits by the United States, *see, e.g., United States v. Texas,* 143 U.S. 621, 641-46, 12 S.Ct. 488, 492-94, 36 L.Ed. 285 (1892); and by sister states, *see, e.g., South Dakota v. North Carolina,* 192 U.S. 286, 24 S.Ct. 269, 48 L.Ed. 448 (1904). Finally, the Court has created a third, extremely limited category of consent. This consent is premised on the state's participation in a congressional program which, as a prerequisite for participation, mandates that the state consent to suit. The Court has found this form of consent to exist in only one case: *Parden v. Terminal Railway of Alabama,* 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964).

We find that neither Alabama nor Florida has consented to a suit under IGRA.

1.

Express waivers of a state's Eleventh Amendment sovereign immunity must be explicitly authorized by the state "in its Constitution, statutes and decisions." *Silver v. Baggiano,* 804 F.2d 1211, 1214 (11th Cir. 1986) (quoting *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 467, 65 S.Ct. 347, 352, 89 L.Ed. 389 (1945)). *See also Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). The Alabama defendants cite Article I, section 14 of the Alabama Constitution, which specifically reserves Alabama's sovereign immunity, and claim that Alabama therefore could not have consented to a suit under IGRA. Even though Florida has not raised a similar defense, plaintiffs have failed to demonstrate that either state has given express consent to this suit. Therefore, we find that the states have not expressly waived their Eleventh Amendment sovereign immunity.

2.

Nor does "plan of the convention" consent imperil the states' sovereign immunity. Three terms ago, the Supreme Court addressed the question whether the states, by ratifying the Constitution, had surrendered their sovereign immunity to suits by Indian tribes. The court compared suits brought by sister states to suits brought by Indian tribes and held that the states had not waived their sovereign immunity to suits brought by Indian tribes under the "plan of the convention":

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of the concession. There is no such mutuality with either foreign sovereigns or Indian tribes. . . . [I]f the convention could not surrender the *tribes*' immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford v. Native Village of Noatak, —— U.S. ——, ——-——, 111 S.Ct. 2578, 2582-83, 115 L.Ed.2d 686 (1991) (emphasis in original). The Court's holding in *Blatchford* governs our resolution of this issue. Thus, we hold that the states cannot be said to have surrendered their sovereign immunity under the "plan of the convention."

3.

Finally, the tribes assert that both Florida and Alabama have consented to this suit by participating in negotiations under IGRA. Invoking *Parden*, 377 U.S. 184, 84 S.Ct. 1207 (1964), the tribes assert that the states have attempted to reap the benefits of IGRA and therefore should be held to have consented to the downside of the statute, specifically, federal jurisdiction over the present suits. We disagree.

In *Parden*, the Supreme Court for the first—and, to date, last—time found that a state had waived its immunity to suit by participating in a federal program mandating that participants consent to suit. The facts of that case, as well as subsequent Supreme Court decisions, render *Parden* inapplicable to the appeals at hand.

First, it is apparent that *Parden* was decided largely on its facts. In that case, the State of Alabama had operated a for-profit, state-owned railroad for twenty years. By operating the railroad in interstate commerce, Alabama effectively had transcended the typical realm of state authority by entering the private market, a market in which all employers were subject to the strictures passed by Congress. The limited holding of the Court was that, based on these facts, Alabama should be subject to the same requirements as the other (private) participants in the private market; one of those requirements was that all market actors consent to suit. These cases involve state governments negotiating with sovereign tribes located within the states' borders—hardly a "private" activity—and thus do not raise the same concerns that prompted the Supreme Court's unique decision in *Parden*.

Second, later decisions of the Supreme Court limit *Parden* and indicate that Alabama and Florida cannot be said to have consented to suit in this case. First, in *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), the Court declined to extend *Parden* to circumstances in which a state was operating a non-profit hospital facility, a traditional state activity. The next year, in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Court refused to find *Parden*-style consent when Illinois participated in a federal program by agreeing to administer federal and state funds in accordance with federal law. The Court reiterated this holding a decade later in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 121 (1985). Finally, the Court further limited *Parden* in *Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987).

In fact, in no other case has the Court found consent pursuant to its *Parden* decision.

When *Parden* and its progeny are examined closely, it is apparent that, although *Parden* may not be entirely dead, it certainly is not quick enough to breathe life into the Indian tribes' claims in these cases. In these cases, the states were faced with a Hobson's choice: refuse to negotiate with the tribes, and therefore be subject to suit under IGRA; or negotiate with the tribes, and therefore (according to the tribes' argument) consent to suit under IGRA. Thus, we cannot find the same voluntary, for-profit, private-enterprise operation involved in *Parden* and decline to hold that Alabama and Florida consented to suit.[5]

Thus, we find that neither Florida nor Alabama consented, either expressly, implicitly, or by conduct under *Parden*, to suit in federal court under IGRA.

B.

In defining the second sovereign immunity exception, the Supreme Court has held that states also may not rely on the defense of sovereign immunity if Congress has specifically abrogated that defense when legislating pursuant to certain of its plenary powers. *See, e.g., Fitz-*

[5] One sister circuit, in determining that the Eleventh Amendment did not bar suits under IGRA, mentioned that the state had "actively engaged in negotiating tribal-State compacts and ha[d] reaped the benefits from these negotiations." *See Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273 (8th Cir. 1993) (*"Cheyenne II"*), *aff'g* 830 F. Supp. 523 (D.S.D. 1993) (*"Cheyenne I"*). As the Eighth Circuit Court of Appeals primarily rested its decision on the fact that Congress had abrogated the state's Eleventh Amendment immunity, an argument we discuss (and reject) in part III.B., below, it is not clear how much weight the court gave to the state's participation in negotiations. To the extent that the Eighth Circuit relied on South Dakota's negotiations as a basis for finding a waiver of sovereign immunity, we respectfully disagree.

patrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed. 2d 614 (1976) (finding abrogation in legislation passed pursuant to § 5 of the Fourteenth Amendment); and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989) (finding abrogation in legislation passed pursuant to the Congress' Article I, § 8 plenary power over commerce). The Court has not yet found that Congress possesses the power to abrogate the states' sovereign immunity when legislating under any other provisions of the Constitution.

The tribes' most significant argument is that Congress abrogated the states' Eleventh Amendment immunity when it granted jurisdiction to the district courts in 25 U.S.C. § 2710(d). The district court in *Seminole*, as well as one sister court of appeals and a handful of district courts, have adopted the tribes' position.[6] We disagree, believing that Congress, when it enacted IGRA pursuant to the Indian Commerce Clause, lacked the power to abrogate the states' sovereign immunity.[7]

When determining whether Congress has abrogated the states' Eleventh Amendment immunity, we must conduct a two-part inquiry. We first must determine that the "evidence of congressional intent [to abrogate the states' immunity is] both unequivocal and textual." *Dellmuth v. Muth*, 491 U.S. 223, 230, 109 S.Ct. 2397, 2401, 105 L.Ed.2d 181 (1989) (citing *Atascadero*, 473 U.S. at 242, 105 S.Ct. at 3147). We also must find that Congress possessed the power under the Constitution to abrogate the states' Eleventh Amendment sovereign immunity.

[6] *See Cheyenne II, supra; Kickapoo Tribe of Indians v. Kansas*, 818 F. Supp. 1423 (D. Kan. 1993); *Cheyenne I, supra; Seminole, supra.*

[7] Other courts also have held that Congress lacked abrogation power when it enacted IGRA. *See Sault Ste. Marie Tribe of Chippewa Indians v. Michigan*, 800 F. Supp. 1484 (W.D. Mich. 1992); *Ponca Tribe of Oklahoma v. Oklahoma*, 834 F. Supp. 1341 (W.D. Okla. 1992); *Spokane Tribe of Indians v. Washington*, 790 F. Supp. 1057 (E.D. Wash. 1991); *Poarch I, supra.*

We hold that Congress expressed its intent sufficiently to survive the first prong of this inquiry. That intent can not be given effect, however, as Congress did not possess the power to abrogate the states' immunity when it enacted IGRA.

1.

Several courts have addressed tne question whether Congress unequivocally intended to abrogate the states' immunity when it enacted IGRA. Those courts have had little difficulty concluding that Congress' intent was sufficiently clear. *See, e.g., Cheyenne II, supra*; *Kickapoo,* 818 F. Supp. at 1427 ("[A] clearer statement of the intent to abrogate is difficult to envision."); *Seminole,* 801 F. Supp. at 658; *Sault Ste. Marie,* 800 F. Supp. at 1489 ("clear statement of waiver"); *Poarch I,* 776 F. Supp. at 557; *Ponca, supra.* We believe the question not so easily resolved.

In *Dellmuth,* the Supreme Court reiterated its earlier holdings that a Congressional declaration abrogating the states' Eleventh Amendment sovereign immunity must be explicit: "As we made plain in *Atascadero,* '[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.' 473 U.S. at 246, 105 S.Ct. at 3149." 491 U.S. at 231, 109 S.Ct. at 2402. At first glance, it would appear that IGRA fails that test: Instead of specifically abrogating the states' immunity, section 2710(d)(7)(A) states only that "[t]he United States district courts shall have jurisdiction. . . ." The mere granting of jurisdiction is not equivalent to the abrogation of a defense.

A closer examination of IGRA, however, reveals that, despite Congress' omission of a specific abrogation clause, Congress nonetheless manifested its intent to abrogate the states' immunity. IGRA gives the federal district courts jurisdiction over three types of cases, the first of which is "any cause of action initiated by an Indian tribe arising

from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith." § 2710(d)(7)(A)(i). The only possible defendant to such a suit is a state (*see* part IV(C), below). Thus, unless Congress intended to abrogate the states' immunity, this portion of IGRA would be of no effect. Charged as we are with the task of giving effect to each portion of a statute, we must conclude that Congress intended to abrogate the states' sovereign immunity.[8] Thus, we hold that the first prong of our inquiry is satisfied.

2.

More important and less easily met, is the second prong of our inquiry: whether Congress possessed the constitutional power to abrogate the states' immunity when it enacted IGRA. To resolve this issue, we initially must determine under which provision(s) of the Constitution Congress enacted IGRA (*see* sub-part a). Only then can we determine whether Congress possessed the power to abrogate the states' immunities (*see* sub-part b).

a.

Congress may pass legislation only when the Constitution gives it the authority to do so. As we mentioned earlier, the Supreme Court has held that Congress posseses abrogation powers only when it enacts legislation under the auspices of (1) Section 5 of the Fourteenth

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[8] This conclusion is bolstered by Justice Scalia's opinion in *Dellmuth.* Concurring with the Court's majority opinion. Justice Scalia noted that the majority's "reasoning does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects States to suit for monetary damages, though without explicit reference to State sovereign immunity or the Eleventh Amendment." 491 U.S. at 233, 109 S.Ct. at 2403 (Scalia, J., concurring). Although the facts of that case differ slightly from the case before us, it is clear that Congress in enacting IGRA "clearly subject[ed] States to suit" in § 2710(d)(7).

Amendment or (2) the Interstate Commerce Clause. Plaintiff tribes urge us to find that IGRA was passed not only pursuant to the Indian Commerce Clause, but also pursuant to Section 5 and the Interstate Commerce Clause.[9] We cannot so find.

First, as to the Fourteenth Amendment, plaintiff tribes claim that *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) (holding that Congress may abrogate states' sovereign immunity when legislating pursuant to Section 5 of the Fourteenth Amendment), controls, thus granting Congress the authority to abrogate the states' immunity in IGRA. To justify this contention, the tribes assert that IGRA creates both a liberty interest and a property interest in the tribes and their members. Neither of these claimed interests, however, find support in the Supreme Court's Fourteenth Amendment jurisprudence.

The alleged liberty interest, the tribes claim, arises from the Supreme Court's holding in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Stating that the states' input in IGRA is akin to a licensing requirement, the tribes assert that the states' failure to enter a compact operates exactly as an unconstitutional denial of a license. The alleged property interest likewise is derived from *Roth*. What the tribes fail to recognize,

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[9] Both the so-called Indian Commerce Clause and the so-called Interstate Commerce Clause derive from the same constitutional grant of plenary power to Congress in Article I: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const., art. I, § 8, cl. 3. Although the Interstate and Indian Commerce Clauses are contained in the same textual provision, the purposes that prompted their inclusion in the Constitution, as well as their subsequent legal interpretations, are distinct. *See, e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 1716, 104 L.Ed.2d 209 (1989) ("It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications.").

however, is that these interests are created only when the claimant has "a legitimate claim of entitlement." *Id.* at 577, 92 S.Ct. at 2709. The tribes' bald assertion that IGRA creates such a claim ignores the discretionary nature of the compacting process envisioned by IGRA. IGRA does not create an entitlement to operate gambling operations; rather, it establishes the process and standards by which gambling may be conducted on Indian lands. Thus, IGRA creates no liberty or property interests and cannot implicate the Fourteenth Amendment.

Second, the tribes, noting that Congress' goals in enacting IGRA included "shield[ing] [Indian gaming] from organized crime and other corrupting influences," § 2702(2), assert that Congress necessarily enacted IGRA pursuant to the Interstate Commerce Clause. The tribes look to the legislative history of the Organized Crime Control Act of 1970, Pub.L. No. 91-452, 84 Stat. 922 (1970), to find Congressional reasoning that organized crime burdens interstate commerce. 84 Stat. at 923. The tribes thus conclude that, since Congress meant to address organized crime by enacting IGRA, it passed IGRA under the Interstate Commerce Clause.

We disagree. As § 2702(2) makes clear, Congress' concern with organized crime was not that such activities would burden interstate commerce, but rather that prohibition of organized crime would "ensure that the Indian tribe is the primary beneficiary of the gaming operation, and . . . assure that gaming is conducted fairly and honestly by both the operator and the players." § 2702(2). In addition, Congress wanted to criminalize the involvement of organized crime in order to "promote[] tribal economic development, self-sufficiency, and strong tribal government." § 2702(1). In analyzing Congress' goals, it is clear that alleviating a supposed burden on interstate commerce was not among them.

Having excluded the possibility that Congress enacted IGRA under either the Interstate Commerce Clause or

Section 5 of the Fourteenth Amendment, we must conclude that Congress enacted IGRA solely under the Indian Commerce Clause. The Supreme Court's jurisprudence on the Indian Commerce Clause bolsters our conclusion that Congress enacted IGRA solely under that authority. *See Cotton Petroleum,* 490 U.S. at 192, 109 S.Ct. at 1716 ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.").

b.

Having determined that Congress enacted IGRA solely under the Indian Commerce Clause, we now must determine whether the Indian Commerce Clause permits Congress to abrogate the states' Eleventh Amendment immunity. We conclude that it does not.

The Supreme Court case most relevant to this issue is *Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989). In that case, involving a badly fractured Court, a four-member plurality[10] held that Congress had the power to abrogate the states' Eleventh Amendment immunity when enacting legislation pursuant to the Interstate Commerce Clause. The plurality stated that, since the Interstate Commerce Clause

> withholds power from the States at the same time at its confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not "unconsent-

[10] Justice Brennan authored the opinion; Justices Marshall, Blackmun, and Stevens joined.

> ing"; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis.

Id. at 19-20, 109 S.Ct. at 2284. Thus, the Court held that the State of Pennsylvania could not invoke sovereign immunity in defending a suit for money damages under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") and the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. § 9601 *et seq.*[11]

In a cryptic concurring opinion, Justice White agreed with Justice Brennan's conclusion that Congress had the authority to abrogate the states' immunity; however, he also stated that he did not "agree with much of [Justice Brennan's] reasoning," *id.* at 57, 109 S.Ct. at 2295 (White, J., concurring).[12] It is regrettable that Justice White failed to provide any reasoning of his own to support his conclusion that Congress had abrogation power as his vague concurrence renders the continuing validity of

[11] Congress passed both CERCLA and SARA pursuant to the Interstate Commerce Clause.

[12] Justice White's uneasiness is understandable given the questionable foundation on which Justice Brennan built his argument. His plurality opinion contains three significant weaknesses: (1) it disregards the Supreme Court's statements that *Parden v. Terminal Railway of Alabama,* 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964), was a waiver case, not an abrogation case; (2) it misconstrues *Employees v. Missouri Dep't of Public Health and Welfare,* 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973), by ignoring that it too, solely addressed whether Congress had mandated that Missouri consent to suit before operating a hospital. (Thus, it also was not an abrogation case.); and, (3) it appeared to afford precedential value to two cases, *Welch v. Texas Dept. of Highways and Public Transp.,* 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), and *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985), in which the Court *assumed* that Congress had abrogation power, but specifically denied "deciding, or intimating a view of the question." *Welch,* 483 U.S. at 475, 107 S.Ct. at 2947.

Union Gas in doubt. The other four justices fervently opposed the plurality's holding.

Some courts have noted not only that there are weaknesses in the *Union Gas* Court's holding, but also that changes in the composition of the Court make it likely that a majority of the present Court would disagree with *Union Gas* and find that Congress was *not* empowered to abrogate the states' immunity. Unlike those courts, we refuse to disregard *Union Gas* merely on these bases. Nonetheless, when examined in the proper light, *Union Gas* is distinguishable from the cases before us and does not govern our disposition of this issue. Our conclusion that Congress did not have the power, when enacting IGRA, to abrogate the states' Eleventh Amendment sovereign immunity is supported by two lines of argument.

First, the tribes begin their argument by assuming that *Union Gas* controls all Commerce Clause cases, Indian as well as Interstate; thus, they assert, we are obligated to hold that Congress successfully abrogated the states' immunity when it passed IGRA.[13] We believe it appropriate, however, to limit *Union Gas* to the factual situation before that Court: the exercise of Congress' power to legislate under the Interstate Commerce Clause. CERCLA and SARA were passed pursuant to the Interstate Commerce Clause, not the Indian Commerce Clause. In addition, each of the opinions—plurality, concurrences, and dissents—addressed only the Interstate Commerce Clause. Moreover, the opinions do not suggest that the *Union Gas* holding should be broadly construed. Thus,

[13] The tribes assert that the *Union Gas* Court used the term "Commerce Clause," not "Interstate Commerce Clause," thus evidencing its intention to grant Congress abrogation powers whenever it acted pursuant to any of the Commerce Clauses, Interstate, Indian, or foreign. The Court's entire discussion, as well as every case it cited, focused solely on the Interstate Commerce Clause. We therefore conclude that the Court's discussion, although imprecise, implicated only the Interstate Commerce Clause.

a fair reading of *Union Gas* is one that limits Congress' abrogation powers to laws passed under the Interstate Commerce Clause. As we already have determined that IGRA was passed pursuant to the Indian Commerce Clause, the *Union Gas* holding does not control our disposition of this case.

This conclusion is bolstered by the unique qualities that distinguish the Interstate Commerce Clause and the Indian Commerce Clause. In an attempt to demonstrate this point, defendants suggest that *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192, 109 S.Ct. 1698, 1716, 104 L.Ed.2d 209 (1989) (explaining that "the Interstate Commerce and Indian Commerce Clauses have different applications"), governs our disposition of these cases. That case, which dealt solely with preemption and multiple taxation issues, plainly is distinguishable from the facts before us; thus, the *Cotton Petroleum* Court's conclusion that the Commerce Clause distinguishes between states and Indian tribes is neither surprising nor controlling precedent. Although not directly on point, however, much of the reasoning that supported *Cotton Petroleum* sheds light on the present issue. In that case, the Court acknowledged the plenary powers under the Interstate Commerce Clause that allow Congress to place limits on the states in order to "maintain[] free trade among the States." *Id.* By contrast, "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* Although Congress has the power to limit the states under the Indian Commerce Clause as well, the different purposes underlying the two clauses mandate that they be treated distinctly. As a result, the unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* cannot be extended to the Indian Commerce Clause.

A second argument supporting our conclusion that Congress did not possess the power to abrogate the states' immunity is that a proper reading of *Union Gas* and the

cases cited therein demonstrates that the Court has allowed federal jurisdiction over states only when the states partake in an activity typical of private individuals. For instance, in *Parden,* a case on which the *Union Gas* plurality primarily relied, the State of Alabama was operating a for-profit railroad in interstate commerce. Likewise, in *Union Gas* itself, the State of Pennsylvania was an "owner or operator" of land and therefore, like private citizens, was subject to liability under SARA. On the contrary, when the State of Missouri operated a non-proprietary, not-for-profit hospital (a non-private activity "wholly within [the states'] sphere of authority"), the Court refused to find that Congress mandated federal jurisdiction. *Employees,* 411 U.S. at 282, 93 S.Ct. at 1617 (1973).

In this case, the tribes seek to impose jurisdiction over the States of Alabama and Florida for their failure to negotiate a compact with the tribes. Rather than being a typically private activity, such negotiations are "wholly within [the states'] sphere of authority." We believe the Supreme Court's jurisprudence clearly evinces an intent to allow federal jurisdiction over states only when the state's conduct is outside the typical realm of state authority. As negotiations with tribes certainly are not outside that realm of authority, the principles of federalism and sovereign immunity exemplified in the Eleventh Amendment prevent Congress from abrogating the states' immunity. Thus, even if *Union Gas*' reasoning were to give Congress abrogation power under the Indian Commerce Clause *in general,* we would hold that Congress may not abrogate when it legislates in an area typically reserved to the states (such as negotiating regulations with Indian tribes).

For these reasons, we conclude that Congress did not possess the power to abrogate the states' Eleventh Amendment immunity when it enacted IGRA.

C.

Third, the Supreme Court has created a third exception to the doctrine of sovereign immunity by holding that the Eleventh Amendment does not always provide immunity to government officials; in certain circumstances, those officials may be subject to suit, despite the Eleventh Amendment, under the "fiction" of *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Briefly, the fiction allows an individual to obtain a federal injunction against a state officer to force the officer to comply with federal law. *Id.* at 160, 28 S.Ct. at 454. Under the fiction, the tribes assert that they may sue the governors of Alabama and Florida to compel negotiations under IGRA.

The *Ex parte Young* doctrine does not apply in two cases: (1) it cannot be used to compel an executive official to undertake a discretionary task; and (2) it cannot be used if the suit is, in reality, against the state. As most of the courts that have addressed this issue have found, however, the tribes' claims fit into both categories. *See, e.g., Poarch II,* 784 F. Supp. at 1551-52; *Poarch I,* 776 F. Supp. at 562; and *Ponca, supra.*[14]

First, the *Ex parte Young* doctrine cannot compel discretionary acts. *Ex parte Young,* 209 U.S. at 158, 28 S.Ct. at 453. IGRA does not allot merely ministerial acts to the state, however; rather, it provides for the negotiation of a contract, the terms of which are left to the discretion of the state and the tribe. Likewise, since IGRA provides a procedure should the state decide not to negotiate, even the mere question of whether the state should

[14] The only case to disagree is *Spokane,* 790 F. Supp. at 1062-63. There, the court focused on the need for a forum in which the tribe could air its grievances. The need for a forum, however, does not provide a federal court with the power to override state officials' constitutionally mandated sovereign immunity. Federal court jurisdiction is subject to and limited to the dictates of the Eleventh Amendment, and one judge's desire to give an aggrieved party a remedy does not enlarge it.

negotiate at all is subject to discretion. Thus, both of these facets of IGRA's compacting process demonstrate that the governors must use their discretion; accordingly, under the first exception to the *Ex parte Young* doctrine, the governors retain their Eleventh Amendment sovereign immunity.

Second, if a suit in reality is against the state itself, the *Ex parte Young* doctrine is inapplicable. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101-02, 104 S.Ct. 900, 908-09, 79 L.Ed.2d 67 (1984). IGRA uniformly addresses itself to "the State"; not once does it impose duties or responsibilities on a particular officer of the state (e.g., the governor, the legislature, etc.). Even the district court's injunctive relief powers are limited to ordering "*the State* and the Indian Tribe to conclude" a compact. § 2710(d)(7)(B)(iii) (emphasis added). In addition, IGRA mandates that *the State* negotiate, conclude, and abide by the Tribal-State compact. It is apparent that these suits are not against officials in an attempt to force them to follow federal law; rather, the suits are against the states for failing to negotiate a compact in good faith. At a result, the doctrine of *Ex parte Young* does not apply.

Unless one of the three exceptions—consent, abrogation, or *Ex parte Young*—applies, the Eleventh Amendment serves as a jurisdictional bar and precludes federal court adjudication over these suits. As we have found that none of the exceptions is applicable to IGRA, these cases must be dismissed for lack of subject-matter jurisdiction.

V.

As a result of our holding that the federal courts do not have jurisdiction to reach the issues brought by the tribes in these two suits, the procedures found in §§ 2710 (d)(7)(A)(i) and (B)(i)-(vi) necessarily fail when an unconsenting state refuses to consent to suit.[15]

[15] A state may consent to suit, in which case these provisions remain in full force. *See, e.g., Rumsey Indian Rancheria of Wintun*

The final question we must resolve is whether all provisions for state involvement in class III gaming also fail, as the tribes contend. We hold that they do not. IGRA contains an explicit severability clause, § 2721; and we find no "strong evidence" to ignore that plain congressional directive. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686, 107 S.Ct. 1476, 1481, 94 L.Ed.2d 661 (1987). Nevertheless, we are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands. This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02.

VI.

The decision of the United States District Court for the Southern District of Florida in *Seminole Tribe of Florida v. Florida*, No. 92-4652, is reversed; the case is remanded so that the district court may dismiss the suit. The decisions of the United States District Court for the Southern District of Alabama in *Poarch Band of Creek Indians v. Alabama*, No. 92-6244, are affirmed.

IT IS SO ORDERED.

BLACK, Circuit Judge, specially concurring:

I concur in the result.

Indians v. Wilson, No. Civ-S-92-812 GEB, 1993 WL 360652 (E.D. Cal. July 20, 1993), in which defendants waived their Eleventh Amendment immunity.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. FLORIDA

No. 91-6756-CIV

SEMINOLE TRIBE OF FLORIDA,
Plaintiff,

v.

STATE, OF FLORIDA, LAWTON CHILES,
Governor of the State of Florida,
Defendants.

June 18, 1992

ORDER

MARCUS, District Judge.

THIS CAUSE is before the Court on Defendants' Motion to Dismiss on Eleventh Amendment Grounds, filed December 16, 1991. For the following reasons, the motion is Denied.

I. BACKGROUND

Plaintiff, the Seminole Tribe of Florida (the "Tribe") is a federally recognized Indian tribe whose headquarters are located in Broward County, Florida. The Tribe commenced this action pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), to remediate the alleged failure of the State of Florida to conduct good faith negotiations regarding certain gaming activities to be conducted on the Tribe's land, after State-Tribe compact negotiations failed to yield an agreement. According to the Tribe, "the State and its Governor have refused to enter into any negotiations for inclusion of such gaming in a tribal-state compact, [and have accordingly] violated [IGRA's] requirement of good faith negotiation." Compl. at ¶ 24. The Defendants assert that they have in fact entered into good faith negotiations with the Tribe, but maintain that those negotiations were unavailing since the gaming activities at issue are prohibited under Florida law. In addition, the Defendants have moved to dismiss the action pursuant to the Eleventh Amendment to the United States Constitution, arguing that Congress does not have the power constitutionally to enforce the "good faith" requirement of the compact process by explicitly providing the Tribe a judicial remedy against the State.

II. LEGAL FRAMEWORK

A. *Indian Gaming Regulatory Act*

The Indian Gaming Regulatory Act was enacted by Congress primarily "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. . . ." 25 U.S.C. § 2702(1). IGRA divides Indian gaming into three distinct classes. Class I gaming "means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremones or celebrations." *Id.* at § 2703(6). "Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes" and is not subject to the provisions of IGRA. *Id.* at § 2710(a)(1). Class II gaming includes bingo, pull-tabs, lotto, punch boards, tip jars and other similar games, *id.* at § 2703(7)(A)(i), and certain non-banking card games (not including blackjack and baccarat), *id.* at §§ 2703(7)(A)(ii); 2703(7)(B)(i). "Class II gaming on Indian lands shall continue to

be within the jurisdiction of the Indian tribes," but is subject to the provisions of IGRA, *id.* at § 2710(a)(2), including oversight by National Indian Gaming Commission, established within the Department of the Interior. *Id.* at § 2704(a).

Class III gaming is "all other forms of gaming that are not class I gaming or class II gaming." *Id.* at § 2703(8). "Class III gaming activities shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purpose by any person, organization, or entity. . . ." *Id.* at § 2710(d)(1). IGRA further provides that

> [a]ny Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, *shall* request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, *the State shall negotiate with the Indian tribe in good faith to enter into such a compact.*

Id. at § 2710(d)(3)(A) (emphasis added). Finally, IGRA mandates that

> [t]he United States district courts shall have jurisdiction over . . . any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith. . . .

Id. at § 2710(d)(7)(A)(i). Notwithstanding the express terms of Section 2710, Defendants argue that any such suits brought to remediate a State's alleged failure to negotiate in good faith are barred by the Eleventh Amendment.

B. *Eleventh Amendment*

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The scope of the Amendment has been extended beyond the literal text to also bar suits against a State brought by one of its own citizens. *Hans v. Louisiana,* 134 U.S. 1, 21, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Thus, as the United States Supreme Court has recently observed:

> Despite the narrowness of its terms, since *Hans v. Louisiana* we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; [and] that the judicial authority in Article III is limited by this sovereignty. . . .

Blatchford v. Native Village of Noatak, —— U.S. ——, ——, 111 S.Ct. 2578, 2581, 115 L.Ed.2d 686 (1991) (citation omitted). Three exceptions to the Amendment exist: (1) a State may consent to suit in federal court, or waive its immunity to such suits, either expressly or impliedly; *see id.*; (2) Congress may, when it possesses the power, abrogate the States' immunity; *see Pennsylvania v. Union Gas Co.,* 491 U.S. 1, 13-23, 109 S.Ct. 2273, 2280-86, 105 L.Ed.2d 1 (1989); and (3) state officials may under certain circumstances be sued, in their official capacities, to obtain prospective relief. *See Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Against this framework, we proceed to evaluate Defendant's Motion to Dismiss.

III. ANALYSIS

A. *Abrogation*

The Tribe's central argument in opposition to the Motion to Dismiss is that Congress, in enacting IGRA, abrogated the State's Eleventh Amendment immunity.[1] We hold that Congress did in fact abrogate the States' immunity when it enacted IGRA, and, despite case authority to the contrary,[2] further hold that, pursuant to the Indian Commerce Clause, Congress plainly had the constitutional power to abrogate.[3]

1. Statutory Language

At the outset, the United States Supreme Court has held that

> Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.

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[1] The Tribe also argues that the State has implicitly waived its immunity, either inherently in the "plan of convention", *see Blatchford*, —— U.S. at ——, 111 S.Ct. at 2581, or constructively by the State's acceptance of the benefits of IGRA, *see Parden v. Terminal Railway*, 377 U.S. 184, 192-93, 84 S.Ct. 1207, 1212-13, 12 L.Ed.2d 233 (1964). Since the Tribe has not strenuously pursued either "waiver" theory, and since we reach our decision on purely "abrogation" principles, we need not address the issues raised by these arguments except insofar as they may bear upon Congress' power to abrogate.

[2] *See Sault Ste. Marie Tribe of Chippewa Indians, et al. v. State of Michigan*, No. 90-611, 1992 WL 71384, at *4-5 (W.D. Mich. Mar. 27, 1992); *Spokane Tribe of Indians v. State of Washington*, 790 F. Supp. 1057, 1059-61 (E.D. Wash. 1991); *Poarch Band of Creek Indians v. State of Alabama*, 776 F. Supp. 550, 557 (S.D. Ala. 1991).

[3] Both the Indian and Interstate Commerce Clauses are found in the same delegation of legislative authority, which gives Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." U.S. Const. art. I, § 8, cl. 3.

See Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 105 S.Ct. 3142, ——, 87 L.Ed.2d 171 (1985); *see also Blatchford*, —— U.S. at ——, 111 S.Ct. at 2584; *Dellmuth v. Muth*, 491 U.S. 223, 226, 109 S.Ct. 2397, 2399, 105 L.Ed.2d 181 (1989). In the instant case, the relevant portion of IGRA provides:

> The United States district courts shall have jurisdiction over . . . any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith. . . .

25 U.S.C. § 2710(d)(7)(A)(i). It is beyond preadventure that, in expressly providing for federal jurisdiction over claims brought by Indian tribes against States to compel good faith negotiations under IGRA (or to remedy the lack of such negotiations), Congress made its intention to abrogate the States' immunity in this context "unmistakably clear in the language of the statute." *See Atascadero*, 473 U.S. at 242, 105 S.Ct. at 3147. Indeed, the State of Florida concedes as much. *See* Def. Mem. at 14 ("There is little doubt but that IGRA's attempted abrogation of state immunity is clear enough to do so if Congress has the power to abrogate in this situation."). Moreover, every court to squarely consider this precise issue has concluded that the language in Section 2710 is "unmistakably clear." *See Sault Ste. Marie Tribe of Chippewa Indians, et al. v. State of Michigan*, No. 90-611, 1992 WL 71384, at *4 (W.D. Mich. Mar. 27, 1992) ("IGRA demonstrates specific Congressional intent that *states* be subject to suit in federal courts based upon violations of IGRA. This Court finds that the Act is a clear statement of waiver of sovereign immunity." (emphasis in original)); *Poarch Band of Creek Indians v. State of Alabama*, 776 F. Supp. 550, 557 (S.D. Ala. 1991) ("[T]his Court has little doubt but that IGRA's attempted abrogation of state immunity is clear enough

to do so if Congress has the power to abrogate in this situation. . . . It is difficult to imagine a clearer statement of Congress' intent to subject states to lawsuits in the federal courts."). Accordingly, we find that IGRA, on its face, abrogates the States's Eleventh Amendment immunity. That does not end the inquiry, however.

2. Congressional Power to Abrogate

A more difficult question is whether, notwithstanding its manifest intent to do so, Congress had the power to abrogate the States' immunity in the context at issue here. Given Congress' plenary authority over Indian relations, explicitly noted in the text of the Constitution at Article I, § 8, cl. 3, and the uniquely federal issues raised when such authority is exercised, considered in conjunction with the principles enunciated by the Supreme Court in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), we conclude that Congress, when acting pursuant to the Indian Commerce Clause, has the power to abrogate the States' immunity.

We begin by observing that the Indian Commerce Clause of the Constitution provides that "Congress shall have power . . . To regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Congressional power over Indian affairs is plenary. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192, 109 S.Ct. 1698, 1715-16, 104 L.Ed.2d 209 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs. . . ."); *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234-35, 105 S.Ct. 1245, 1251-52, 84 L.Ed.2d 169 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law." (citing The Federalist No. 42)); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980) ("Congress has broad power to regulate tribal affairs under the Indian Commerce Clause.

. . ."); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al., v. Voigt*, 700 F.2d 341, 361 (7th Cir.) ("Congress has plenary authority over Indian affairs. This power is rooted in . . . the Indian commerce clause. . . ." (citation omitted)), *cert. denied*, 464 U.S. 805, 104 S.Ct. 53, 78 L.Ed.2d 72 (1973); *Agua Caliente Band of Mission Indians v. County of Riverside*, 306 F. Supp. 279, 282 (C.D. Cal. 1969) ("The nature of Congressional power in Indian matters is paramount and plenary."); *aff'd*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 938, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972).

In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832), Chief Justice Marshall, writing for the High Court, observed that

> [the Articles of Confederation] gave the United States in congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians, not members of any of the states; provided, that the legislative power of any state within its own limits be not infringed or violated."
>
> * * * *
>
> The correct exposition of this [section of the Articles of Confederation] is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restriction on their free actions; the shackles imposed on this power, in the [Articles of Confederation], are discarded.

31 U.S. at 558-59. *See also United States v. City of Salamanca*, 27 F. Supp. 541, 543 (W.D.N.Y. 1939)

("Any doubt as to whether under the Articles of Confederation certain rights over the Indians were reserved to the states was removed by the adoption of the Constitution."); The Federalist No. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961) ("The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation. . . ."). And in *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), a unanimous Supreme Court opined:

> Resolution of the instant issue [of whether an Indian employment preference violates the Due Process Clause of the Fifth Amendment] turns on the unique federal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself.

417 U.S. at 551-52, 94 S.Ct. at 2483.[4] It is thus abundantly clear that issues pertaining to Indian affairs are

[4] Still other courts, and a number of commentators, have acknowledged the uniquely federal nature of Indian relations, and the breadth of congressional power in that area. *See McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 168, 93 S.Ct. 1257, 1260, 36 L.Ed.2d 129 (1973) (" 'The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' " (quoting *Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 991, 89 L.Ed. 1367 (1945))); *James v. Watt*, 716 F.2d 71, 73-77 (1st Cir. 1983) (undertaking analysis of dormant effect of Indian Commerce Clause), *cert. denied*, 467 U.S. 1209, 104 S.Ct. 2397, 81 L.Ed.2d 354 (1984); *see also* Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 U.C.L.A. L. Rev. 759 (1991) (acknowledging that "the grant of power to Congress over the Indians may be 'plenary' . . . in the sense that its power over interstate commerce is plenary," but arguing that both are equally restricted by the equal protection element of the Fifth

uniquely federal, and that in regulating such affairs *vis-a-vis* the States, congressional authority is plenary.

Moreover, it has repeatedly been observed that Congress may abrogate the States' immunity when it acts pursuant to a plenary grant of authority plainly embodied in the textual framework of the Constitution. *See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. at 15, 109 S.Ct. at 2281-82; *Hutto v. Finney*, 437 U.S. 678, 693-94, 98 S.Ct. 2565, 2574-75, 57 L.Ed.2d 522 (1978); *Richard Anderson Photography v. Brown*, 852 F.2d 114, 123-24 (4th Cir. 1988) (Boyle, J., concurring in part and dissenting in part), *cert. denied*, 489 U.S. 1033, 109 S.Ct. 1171, 103 L.Ed.2d 229 (1989); *United States v. Union Gas Co.*, 832 F.2d 1343, 1356 (3d Cir. 1987), *aff'd*, 491 U.S. 1 (1989); *Matter of McVey Trucking, Inc.*, 812 F.2d 311, 323 (7th Cir.), *cert. denied*, 484 U.S. 895, 108 S.Ct. 227, 98 L.Ed.2d 186 (1987); *Malone v. Schenk*, 638 F. Supp. 423, 426 (C.D. Ill. 1985).[5] Congress' paramount and plenary authority over Indian affairs is therefore a substantial basis upon which to find congressional power to abrogate when legislating pursuant to that authority.

We next turn to a consideration of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989). In *Union Gas*, the Supreme Court held that the plain language of the Comprehensive Environmental

Amendment); Ainsworth, *The Negative Foreign Commerce Clause: An Analysis of the Reserved Unitary Tax Issue in* Container Corporation of America v. California Franchise Tax Board, 8 B.U.J. Tax L. 65 (1990) ("it is Congress, not the states, which must fairly regulate commerce 'with the Indian tribes' ").

[5] We note that, in the Bankruptcy Clause context, the United States Court of Appeals for the Eleventh Circuit has expressly left open the question of congressional power to abrogate. *TEW v. Arizona State Retirement System*, 873 F.2d 1400, 1401 (11th Cir. 1989) (per curiam) ("Because we hold that Congress has not expressly abrogated sovereign immunity here, we do not reach the constitutional question of whether it would have the authority to do so." (citation omitted)).

Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, permits a suit for monetary damages against a state in federal court. 491 U.S. at 5, 109 S.Ct. at 2276. Further, a majority of the Court concluded that Congress has the power to abrogate the States' immunity when legislating pursuant to the Interstate Commerce Clause. *Id.* at 13-23, 57, 109 S.Ct. at 2280-86, 2295. Justice Brennan authored the plurality opinion of the Court on the abrogation issue, in which Justices Marshall, Blackmun, and Stevens joined. Justice White filed a separate opinion in which he concurred in the judgment and noted his agreement "that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States. . . ." 491 U.S. at 57, 109 S.Ct. at 2295. Justice Brennan's plurality opinion reasoned that Congress possessed such power principally by virtue of "the plenary powers granted it by the Constitution" to regulate interstate commerce, *id.* at 14-19, 109 S.Ct. at 2281-84 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 2670-71, 49 L.Ed.2d 614 (1976) (holding that Congress may abrogate States' immunity when legislating under § 5 of the Fourteenth Amendment, since its powers under that amendment are plenary)), and also, to a lesser extent, by virtue of the States' surrender of immunity in the "plan of convention" regarding matters within the ambit of the Interstate Commerce Clause.[6] *Id.*, 491 U.S. at 19-23, 109

[6] Defendants argue that the applicability of *Union Gas* to the instant case is undermined by the Tribe's inability to satisfy the "plan of convention" prong of that decision since no State-Tribe "mutuality" was represented in the "plan of convention." We cannot agree. The plurality's "plan of convention" discussion in *Union Gas* is, in our view, more a natural extension of the "plenary power" basis of the decision than a separate requirement of mutuality, since, even when discussing the "plan of convention," the Court was primarily concerned with Congress' plenary powers in the area of interstate commerce, observing:

> It would be difficult to overstate the breadth and depth of the commerce power. It is not the vastness of this power, however,

S.Ct. at 2284-86. Since Congress clearly posseses complete and plenary authority in the area of Indian affairs, which is at least as broad as Congress' interstate commerce power, *see* note 8, *infra*, we hold that Congress has the power to abrogate the States' immunity pursuant to the Indian Commerce Clause.

Defendants have rested their Eleventh Amendment argument on three recent district court opinions, *Sault Ste. Marie Tribe of Chippewa Indians, et al. v. State of Michigan*, No. 90-611, 1992 WL 71384 (W.D. Mich. 1992); *Spokane Tribe of Indians v. State of Washington*, 790 F. Supp. 1057 (E.D. Wash. 1991); and *Poarch Band of Creek Indians v. State of Alabama*, 776 F. Supp. 550 (S.D. Ala. 1991). First, Defendants observe that the district courts in both the *Sault Ste. Marie* and the *Poarch* cases expressed misgivings as to the continuing vitality of *Union Gas*, with the court in *Poarch* going so far as to conclude that,

> that is so important here: it is its effect on the power of the States.

491 U.S. at 20, 109 S.Ct. at 2284 (citations omitted). This is precisely the same observation advanced by the Court when analyzing Congress' plenary power in this area:

> [T]he Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States. . . . The important point . . . is that the provision both expands federal power and contracts state power; that is the meaning, in fact, of a "plenary" grant of authority. . . .

Id. at 16-17, 109 S.Ct. at 2282-83.

We thus rest today's decision primarily on Congress' plenary power over Indian affairs, rather than on a "mutuality in the plan of convention" theory, for a number of reasons. First, an explication of plenary congressional power is, in our view, the central thrust of *Union Gas*, and is a proper basis on which to find congressional power to abrogate. In addition, the latter theory seemingly begs the question by presuming that the states have already ceded their sovereignty. Finally, we think, "plan of convention" cession is more properly a "waiver" argument than an "abrogation" argument, and, in the Indian affairs context, was rejected in *Blatchford*, —— U.S. at ——-——, 111 S.Ct. at 2581-83.

> [b]ecause *Union Gas* is not directly on point, and with an eye toward the shaky ground on which it stands, this Court does not find the decision to be controlling. The weakness of the plurality opinion leads this Court to believe that it should not be given an expansive application. . . .

776 F. Supp. at 558.[7] We are unpersuaded. As already noted, a majority of the Supreme Court in *Union Gas* held that Congress had the power to abrogate the States' immunity under the Interstate Commerce Clause; *Union Gas* is binding authority on this Court. It is a mistake to simply dismiss *Union Gas* as being inapposite, especially since congressional power over both interstate and Indian commerce derives from precisely the same Constitutional clause, Article I, § 8, cl. 3, and since its power in both areas is plenary. *See Matter of McVey Trucking,* 812 F.2d at 323 (holding that "Congress may abrogate state immunity to suit pursuant to any of its plenary powers," including the Bankruptcy Clause of Article I, § 8, cl. 4); *Peel v. Florida Dep't of Transp.,* 600 F.2d 1070, 1085 (5th Cir. 1979) (finding authority to abrogate pursuant to Congress' war powers, and observing that "nothing in the history of the eleventh amendment, the doctrine of sovereign immunity, or the case law indicates that Congress, when acting under an [A]rticle I, section 8 delegated power, lacks the authority to provide for federal court enforcement of private damage actions against the states"); *BV Engineering v. University of Cal., Los Angeles,* 657 F. Supp. 1246, 1248 (C.D. Cal.

[7] *See also Sault Ste. Marie,* 1992 WL 71384, at *5 (district court settles on a "narrow reading of *Union Gas*"); *Mississippi Band of Choctaw Indians v. State of Mississippi,* No. 90-386, 1991 WL 255614, at *6 (S.D. Miss. Apr. 9, 1991) ("[T]he Court notes that it does not consider the *Union Gas* decision itself controlling precedent upon which the eleventh amendment questions at issue here could be decided. *Union Gas* dealt with congressional abrogation of state immunity through an exercise of authority under the interstate commerce clause. The instant matter involves the Indian commerce clause.").

1987) (finding congressional power to abrogate pursuant to Article I, § 8, cl. 8 (copyright powers), and observing that "Congress 'may abrogate state immunity to suit pursuant to any of its plenary powers' " (quoting *Matter of McVey Trucking,* 812 F.2d at 315-23)), *aff'd,* 858 F.2d 1394 (9th Cir. 1988), *cert. denied,* 489 U.S. 1090, 109 S.Ct. 1557, 103 L.Ed.2d 859 (1989).

The Defendants also attempt to draw important distinctions between the Interstate and Indian Commerce Clauses, citing principally to *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192, 109 S.Ct. 1698, 1715-16, 104 L.Ed.2d 209 (1989), where the Supreme Court observed that "[i]t is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications." Indeed, the courts in both *Spokane Tribe of Indians v. State of Washington,* 790 F. Supp. at 1059-61, and *Poarch,* 776 F. Supp. at 559, concluded from this language that it would be inappropriate to apply theories based on one clause to the other. Again, we do not find the argument persuasive. As we noted above, congressional power over both interstate and Indian commerce derives from the same clause in the Constitution; and we are hard pressed to conclude that the congressional authority to abrogate the States' immunity in the area of interstate commerce is greater than in Indian commerce. Indeed, Defendants here acknowledged as much at oral argument:

> THE COURT: Let me ask you a question. Is congressional authority under Article I, Section 8, dealing with the power to regulate commerce with the Indian tribes any less sweeping than the power to regulate commerce with foreign nations and among the several States?
>
> MR. GLOGAU: No, it is not.

Transcr. of Hrng. of Jan. 13, 1992, at 10. Defendants nonetheless argue that Congress' power over Indian commerce is of a "very different specie" than the power over

interstate commerce, and that *Union Gas* is therefore readily distinguishable, since the Indian commerce power lacks an element of "mutuality" found in the area of interstate commerce. *See id.* 491 U.S. at 10-16, 109 S.Ct. at 2278-82. This argument is unconvincing, and we conclude that, based on its paramount and plenary authority over Indian affairs, Congress' power to act pursuant to the Indian Commerce Clause is at least as great, if not greater, than its powers under the Interstate Commerce Clause.[8] Moreover, *Cotton Petroleum* does not undercut this conclusion, since that decision goes on to note:

[8] *Accord Howard v. Illinois Central R. Co.*, 207 U.S. 463, 521, 28 S.Ct. 141, 154-55, 52 L.Ed. 297 (1908) (Moody, J., dissenting) ("There is nothing in the words of the grant [of commerce power to Congress] that permits the belief that the power is not coextensive over foreign, interstate, and Indian trade, or is anything less than the whole power which any government may properly exercise over either. . . ."); *Wabash R. Co. v. United States*, 168 F. 1, 4 (7th Cir. 1909) ("When the Declaration of Independence ripened into fact, the several states could have taken their separate places in the family of nations as absolutely sovereign powers, and the commerce among them would have been on the same footing as commerce "with foreign nations" and "with Indian tribes." On abandoning their "firm league of friendship" and adopting the Constitution, the states divested themselves of the power to regulate interstate commerce as completely as they did of the power to regulate foreign commerce, and transferred to the nation in equal terms the power to regulate both. To the extent that there is a difference between the power of Congress over interstate commerce and over foreign commerce, it comes not from any difference in the grants, but from the fact that other provisions of the Constitution which may limit the exercise of power over interstate commerce may have no application to foreign commerce."); Ainsworth, *supra* note 4 ("First, Indian Commerce Clause analysis is structured differently than Interstate Commerce Clause analysis. It proposes a tripartite balancing of unequal interests (tribal, state, and federal) rather than a binary balancing of constitutionally equal interests (two similarly situated taxpayers in the same or different states). Second, under the Indian Commerce Clause, there is a presumption against state authority to tax Indian-value without express Congressional approval; whereas under the Interstate Commerce Clause, there is a presumption in favor of any

> In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, *the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.*

490 U.S. at 192, 109 S.Ct. at 1715-16 (emphasis added).[9]

Finally, Defendants rely on *Blatchford* in concluding that Congress lacked the power to abrogate.[10] This reliance is misplaced, we think, since *Blatchford* is primarily a "waiver" case, and its concerns over a lack of "mutuality of . . . concession," —— U.S. at ——-——, 111 S.Ct. at 2581-83, are properly limited to that context. But even if, as Defendants assert, the "waiver" principles enunciated in *Blatchford* can be said to speak to Congress' power to abrogate—and we think they do not—the lack of State-Indian mutality is a matter of relatively minor importance. First, Congress' plenary power over the uniquely federal area of Indian affairs is the

non-discriminatory state taxing scheme which has not been expressly disapproved of by Congress. Finally, under the Indian Commerce Clause, it is the quantitative weight of the burden imposed on Indian Commerce that is the significant question; whereas under the Interstate Commerce Clause, it is the equal distribution of tax burdens among taxpayers, regardless of the absolute amount of the overall burden, that matters."); Resnick, *Dependent Sovereign: Indian Tribes, States, and the Federal Courts*, 56 U. Chi. L. Rev. 671 (1989) ("[T]he 'Indian commerce clause could be read as expansively as the Interstate commerce clause.' Under such a reading, the constitutional limits on congressional power over Indian tribes may be more formal than real." (quoting Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self Government*, 33 Stan. L. Rev. 979, 997 (1981))).

[9] At all events, *Cotton Petroleum* is of limited help here since the issue there was whether Indian tribes could be treated as States for tax apportionment purposes.

[10] The *Spokane Tribe* and *Sault Ste. Marie* courts also relied on *Blatchford* in reaching the same conclusion.

primary basis on which we rest today's decision. Second, we are not persuaded that a lack of mutuality between the States and the Indian nations is a compelling deficiency, since there did in fact exist a mutuality between the federal government—in which plenary power to regulate Indian affairs was vested—and the States. And although the lack of State-Indian mutality may undercut the argument that the States *waived* their immunity to any and all suits by Indian tribes, the importance of that want of mutuality is diminished when a suit is brought pursuant to explicit congressional authorization, since the linchpin of abrogation must be the nature of the power pursuant to which Congress raised the Eleventh Amendment barrier. Furthermore, to the extent that *Blatchford* does expressly discuss abrogation, that discussion never reaches the issue of congressional power, since the Court concluded that Section 1362 of Title 28 did not contain "unmistakably clear" language evincing Congress' intent to abrogate.[11] —— U.S. at ——, 111 S.Ct. at 2586. Thus, *Blatchford* is wholly silent on the principal issue raised here of congressional power to abrogate, and as such is readily distinguishable. Accordingly, it is

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss is DENIED.

DONE AND ORDERED.

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[11] That section provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1362. Notably absent from Section 1362 is language specifically referencing the States, as is present in the statute conferring jurisdiction in the instant case, 25 U.S.C. § 2710(d)(7)(A)(i).

APPENDIX C

[Filed Sep. 22, 1993]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case 91-6756-CIV-MARCUS

SEMINOLE TRIBE OF FLORIDA,
Plaintiff,

v.

STATE OF FLORIDA, LAWTON CHILES,
Governor of the State of Florida,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court pursuant to the Plaintiff, SEMINOLE TRIBE OF FLORIDA's ("the Tribe"), Motion for Summary Judgement and the Defendants, the STATE OF FLORIDA and LAWTON CHILES's ("the State"), Motion for Summary Judgement, both of which were filed on October 9, 1992, and pursuant to the Tribe's Supplemental Motion for Summary Judgment, filed on March 19, 1993.

The Tribe brought this action under the Indian Gaming Regulatory Act, 28 U.S.C. §§ 2701-21, 18 U.S.C. §§ 1166-68 ("IGRA"). The Tribe alleges that the State has failed to negotiate in good faith by refusing to in-

clude the Tribe's request to conduct certain forms of machine or computer-assisted gaming and casino type gaming in the negotiation of a Tribal-State compact governing gambling on Tribal lands. The Tribe claims that such gaming is permitted by the State and is therefore a mandatory subject of negotiations under the IGRA. The State maintains, however, that, while it has agreed to negotiate for other types of gaming, it need not negotiate for machine or computer-assisted gaming or casino type gaming precisely because those specific types of gaming are not permitted by the State. The Court heard oral argument on the cross-motions for summary judgment on December 11, 1992. In addition, by Order of January 5, 1993, the Court granted the Tribe's Motion to Re-Open Discovery on the issue of the State's treatment of foreign flag vessels which operate gambling cruises from Florida ports. The Tribe filed its Supplemental Motion for Summary Judgment based on the additional discovery on March 19, 1993, the State filed its response on April 6, 1993 (and the Tribe filed its reply on April 12, 1993, at which time the issues were fully joined. Based on our thorough review of the case and the record, it is hereby

ORDERED AND ADJUDGED that the State's Motion for Summary Judgment is GRANTED and the Tribe's Motion for Summary Judgment and Supplemental Motion for Summary Judgment are DENIED for the reasons detailed at some length below.

I.

The following facts have been stipulated to by the parties in their Joint Pretrial Stipulation. On January 29, 1991, the Tribe asked the State to commence negotiations pursuant to the IGRA for a compact governing the Tribe's proposed operation of certain forms of gambling on Tribal lands. On March 4, 1991, the Tribe submitted a proposed contract providing for Tribal operation of poker, and machine or computer-assisted games

which duplicate poker, bingo, pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo. By letter of May 24, 1991, the State, through the Governor's General Counsel, J. Hardin Peterson, Jr., agreed to negotiate poker and other games allowed by Fla. Stat. Anno. § 849.085 (West Supp. 1993), but rejected all of the Tribe's other compact requests. The letter set forth the State's preliminary legal position on the scope of games believed by the State to be subject to compact negotiations and also contained suggestions for issues to be negotiated related to regulatory matters. On June 18, 1991, Seminole Chairman James Billie requested Florida Governor Lawton Chiles's personal involvement in compact negotiations. The Chairman submitted additional games that the Tribe asserted met the objections set forth in the May 24 letter from Peterson, and, at the same time, requested expansion of negotiations to include casino gambling. On June 25, 1991, the Tribe submitted a ten-page legal memorandum to the State in support of the lawfulness of the proposed compact. (Joint Pretrial Stipulation at 4, ¶¶ 1-5).

On August 22, 1991, representatives of the Tribe met with State representatives to discuss the Tribe's compact request. The State agreed to negotiate concerning poker and other card games, raffles, and parimutual wagering on dog and horse racing and jai alai. In response to questions from the State representatives, there was some discussion of how the Tribe would conduct these games if a compact were approved. The State, however, refused to negotiate a compact covering any machine or computer-assisted gaming which the State contended would violate Fla. Stat. Anno. §§ 849.15 and 849.16 (West 1976 & Supp. 1993). Specifically, the State refused to negotiate a compact covering any form of casino gambling. (Joint Pretrial Stipulation at 4-5, ¶ 6).

On September 17, 1991, the State and the Tribe met to continue discussions. The State expressed its willing-

ness to negotiate a compact for games permitted under the interpretation of IGRA set forth in its September 13 letter. The Tribe decided not to continue negotiations at that time and subsequently filed the instant lawsuit. By letter dated September 14, 1992, the Tribe contacted the State requesting that negotiations be resumed. (Joint Pretrial Stipulation at 5, ¶¶ 6.1-6.2).

II.

The standard to be applied in reviewing a summary judgment motion is stated unambiguously in Rule 56(c) of the Federal Rules of Civil Procedure:

> The judgment sought shall be rendered forthwith if the pleading, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Thus, summary judgment may be entered only where there is *no* genuine issue of material fact. Moreover, the moving party has the burden of meeting this exacting standard. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

In applying this standard, the Eleventh Circuit has explained:

> In assessing whether the movant has met this burden, the courts should view the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion. *Adickes*, 398 U.S. at 157, 90 S.Ct. at 1608; *Marsh*, 651 F.2d at 991. All reasonable doubts about the facts should be resolved in favor of the non-movant. *Casey Enterprises, Inc. v. American Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981). If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial.

Marsh, 651 F.2d at 991; *Lighting Fixture & Elec. Supply Co. v. Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969). Summary judgment may be inappropriate even where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co.*, 420 F.2d at 1213. If reasonable minds might differ on the inferences arising from undisputed facts, then the court should deny summary judgment. *Impossible Electronics*, 669 F.2d at 1031; *Croley v. Matson Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 1970).

Moreover, the party opposing a motion for summary judgment need not respond to it with any affidavits or other evidence unless and until the movant has properly supported the motion with sufficient evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. at 160, 90 S.Ct. at 1609-10; *Marsh*, 651 F.2d at 991. The moving party must demonstrate that the facts underlying all the relevant legal questions raised by the pleading or otherwise are not in dispute, or else summary judgment will be denied notwithstanding that the non-moving party has introduced no evidence whatsoever. *Brunswick Corp. v. Vineberg*, 370 F.2d 605, 611-12 (5th Cir. 1967). *See Dalke v. Upjohn Co.*, 555 F.2d 245, 248-49 (9th Cir. 1977).

Clemons v. Dougherty County, Ga., 684 F.2d 1365, 1368-69 (11th Cir. 1982). *See also Amay, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986).

The United States Supreme Court has provided significant additional guidance as to the evidentiary standard which trial courts should apply in ruling on a motion for summary judgment:

> [The summary judgment] standard mirrors the standard for a directed verdict under Federal Rule of

> Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943).

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The Court further stated that "[t]he mere existence of a scintilla of evidence in support of the position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]." *Id.* at 252. In determining whether this evidentiary threshold has been met, the trial court "must view the evidence presented through the prism of the substantive evidentiary burden" applicable to the particular cause of action before it. *Id.* at 254. If the non-movant in a summary judgment action fails to adduce evidence which would be sufficient, when viewed in a light most favorable to the non-movant, to support a jury finding for the non-movant, summary judgment may be granted. *Id.* at 254-55.

In another case, the Supreme Court has declared that a non-moving party's failure to prove an essential element of a claim renders all factual disputes as to that claim immaterial and requires the granting of summary judgment:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will *bear* the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (emphasis added).

The parties agree that there are no genuine issues of material fact in dispute and that the matter may properly be disposed of on cross-motions for summary judgment. (Joint Pretrial Stipulation at 13). The parties' respective claims will be evaluated against this standard.

III.

Congress enacted the IGRA in 1988. In its opening text, Congress recognized that:

> (1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue; . . .
>
> (3) existing Federal law does not provide clear standards or regulations for the codnuct of gaming on Indian lands;
>
> (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and
>
> (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2701. The purpose of the IGRA is:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2702.

Basically, the IGRA divides gaming into three classes. Class I gaming "means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Class I gaming is subject to the exclusive jurisdiction of the Indian tribes and is not subject to the regulatory provisions of the IGRA. 25 U.S.C. § 2710 (a)(1).

Class II gaming "means the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) . . . including (if played at the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and games similar to bingo, and card games that (I) are explicitly authorized by the laws of the State or (II) are not explicitly prohibited by the laws of the State and are played at any location in the State," provided those card games are played under the State laws and regulations governing hours of operation and limitations on wagers or pot sizes. 25 U.S.C. § 2703(7)(A). Congress

explicitly excluded "any banking card games, including baccarat, chemin de fer, or blackjack, or . . . electronic or electromechanical facsimilies of any game of chance or slot machines of any kind" from Class II. 25 U.S.C. § 2703(7)(B). The tribes have jurisdiction over Class II gaming, subject to the requirements of the IGRA and the oversight of the National Indian Gaming Commission. 25 U.S.C. § 2710(b).

Class III gaming "means forms of gaming that are not class I gaming or class II gaming." 25 U.S.C. § 2703(8). The parties agree that the games at issue here (*i.e.*, casino gaming and machine or computer-assisted games) are Class III games. The IGRA states:

> Class III gaming activities shall be lawful on Indian lands only if such activities are—
>
> (A) authorized [by an approved Tribal] ordinance or resolution . . . ,
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
>
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is effect.

25 U.S.C. § 2710(d). In order to engage in Class III gaming activities on tribal land, a tribe must first "request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 U.S.C. § 2710(3)(A). The IGRA requires the State to negotiate with the Indian tribe in good faith upon receipt of the tribe's request. *Id.*

Immediately before passage of the IGRA, in the case of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987) the Supreme Court established the standard for evaluating requests by Indian

tribes to conduct gaming activities on tribal lands. In *Cabazon,* the State of California objected to the Indian tribe's operation of bingo games on tribal property. The state argued that the tribe's bingo operations violated a state penal statute which, while it did not prohibit bingo, imposed prize limits and required the games to be "operated and staffed by members of designated charitable organizations who may not be paid for their services." *Cabazon,* 480 U.S. 205, 107 S.Ct. at 1086. As noted by the Supreme Court, California was a "Public Law 280" state, meaning that Congress had granted California jurisdiction over specified areas of Indian country within its borders. Section 2 of Pub.L. 280 granted California "broad criminal jurisdiction over offenses committed by or against Indians within all Indian country" within California, but Section 4 of Pub.L. 280 granted the state a more limited form of civil jurisdiction. *Cabazon,* 480 U.S. at 207-08, 107 S.Ct. at 1087. Based on this difference in the congressional grant of jurisdiction, the Supreme Court held:

> when a State seeks to enforce a law within an Indian reservation under the authority of Pub.L. 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.

Cabazon, 480 U.S. at 208, 107 S.Ct. at 1088.

In *Cabazon,* the Supreme Court adopted a prohibitory/regulatory distinction to determine whether the state law governing the conduct at issue fell within Pub.L. 280's grant of criminal jurisdiction or not. The Court cautioned that the mere fact that "an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub.L. 280." 480 U.S. at 211, 107 S.Ct. at 1089. Rather, the touchstone is "whether the conduct at issue

violates the State's public policy." 480 U.S. at 209, 107 S.Ct. at 1088. After reviewing the scope of legally permissible gambling activities within California, the Court concluded that "California regulates rather than prohibits gambling in general and bingo in particular." 480 U.S. at 211, 107 S.Ct. at 1089. The Court was not presented with, and thus did not address, the situation where a state adopted a regulatory attitude toward some forms of gambling which would fall under the IGRA's rubric of Class III gaming (*e.g.,* parimutuel betting and a state lottery), but prohibited the specific Class III activities proposed by a tribe.

Review of the *Cabazon* decision is basic when interpreting the IGRA, as Congress incorporated the *Cabazon* decision into both the statutory language and legislative history of the IGRA. The Senate Report accompanying the IGRA makes explicit reference to the *Cabazon* decision in discussing 25 U.S.C. § 2710(b)(1)(A)'s requirement that Class II gaming on Indian property take place only if "located within a State that permits such gaming for any purpose by any person, organization, or entity." The Senate Report offered the following guidance to courts construing that phrase:

> the Committee anticipates that Federal courts will rely on the distinction between State criminal law which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notable by the Supreme Court in *Cabazon.*
>
> . . .
>
> The phrase "for any purpose by any person, organization or entity" makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of

> the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming.

S. Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 3076, 3082. While the Senate Report referred to the phrase as found at 25 U.S.C. § 2710(b)(1)(A), the identical phrase is repeated at 25 U.S.C. § 2710(d)(1)(B) regarding Class III activities. It is a general principle governing statutory construction that when a word or phrase is used in more than one section of an act, and the meaning is clear as used in one place, " 'it will be construed to have the same meaning in the next place'." *United States v. Nunez*, 573 F.2d 769, 771 (2nd Cir.) (citation omitted), *cert. denied*, 98 S.Ct. 2828 (1978). We therefore agree with the Tribe that the legislative history relating to the phrase as found in the provision governing Class II gaming is instructive regarding the meaning of the language found in the provision governing Class III gaming. *See also, Mashantucket Peguot Tribe v. State of Conn.*, 913 F.2d 1024 (2nd Cir. 1990) (reaching same conclusion regarding applicability of legislative history). Coupling the Senate Report with the express language of 25 U.S.C. § 2701(5) *supra*, we conclude that Congress intended the prohibitory/regulatory analysis found in *Cabazon* to be consistent with and to be applied to the IGRA provisions covering both Class II and Class III gaming.

In the instant case, the Tribe argues that the "permits such gaming" provision of the IGRA (*i.e.*, the phrase incorporating *Cabazon*'s regulatory/prohibitory distinction) refers to the "*generic* class of gaming permitted in the State." (Plaintiff's Motion for Summary Judgment at 18) (emphasis in original). Under the Tribe's theory, by allowing *one* form of Class III gaming, the State has evinced a public policy which is regulatory in nature toward *all* forms of Class III gaming. Following the Tribe's argument, because the State allows parimutuel facilities

and the state lottery, all other forms of Class III gaming, such as casinos and machine and computer-assisted games, become mandatory subjects for negotiation of the Tribe-State compact. The State's admitted refusal to include those forms of Class III activities in the compact negotiation would therefore constitute a violation of the good faith requirement imposed upon the State by the IGRA. While we agree that the *Cabazon* standard should be used in the interpretation of the IGRA Class III provisions, we cannot accept the Tribe's broad assertion that the State's permission of specific Class III gaming activities places *all* Class III activities on the table as subject to negotiation.

In support of its position, the Tribe primarily relies on three recent cases interpreting the IGRA: *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990); *Mashantucket Peguot Tribe v. State of Connecticut*, 913 F.2d 1024 (2nd Cir.), *cert. denied*, 111 S.Ct. 1620 (1991); and *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991) (*Lac du Flambeau II*). Contrary to the Tribe's argument, a close reading of these cases does not support its position. Each court considering the *Cabazon* regulatory/prohibitory distinction in relation to the IGRA has conducted a broad review of the state's public policy toward gambling, and, in each case, the court has determined that the *specific gaming activity* proposed by the Indian tribe was in fact permitted by the state.

The *Sisseton-Wahpeton* case arose in the context of Class II gaming. The Indian tribe in that case opened a blackjack enterprise on its South Dakota reservation. The tribe argued, first, that its blackjack operation was grandfathered in as a Class II activity by specific IGRA provisions not relevant to the instant case. The tribe further argued that its operations satisfied the IGRA requirement that the activities take place in a state "that permits such gaming for any purpose by any person, organization or

entity." This is the precise phrase in both the Class II and Class III provisions which is at issue in the instant case. In interpreting that phrase, the court stated that it revealed a congressional intent to permit a "*particular gaming activity* . . . if the state law merely regulated, as opposed to completely barred, *that particular gaming activity.*" 897 F.2d at 365 (emphasis added). After concluding that South Dakota permitted commercial card games including *blackjack,* albeit with wage limits and other constraints, the court found that the IGRA's requirement was met and the Indian tribe could lawfully conduct its *blackjack* operation pursuant to the IGRA.

In *Mashantucket,* the United States Court of Appeals for the Second Circuit addressed a similar issue in the context of the IGRA provisions governing Class III activities. The Indian tribe sought to operate casino-type games of chance on its reservation in Connecticut. The state refused to negotiate a compact for these gaming activities. The district court found that Connecticut statute specifically authorized certain nonprofit organizations to hold Las Vegas nights. Based on this, the district court granted summary judgment in favor of the tribe. In upholding the district court's decision, the Court of Appeals for the Second Circuit stated:

> the district court concluded, after a careful review of pertinent Connecticut law regarding "Las Vegas nights," that Connecticut "permits games of chance, albeit in a highly regulated form. Thus such gaming is not totally repugnant to the State's public policy, . . ."
>
> *This ruling means only that the State must negotiate with the Tribe concerning the conduct of casino-type games of chance at the Reservation.*

913 F.2d at 1031-32. (emphasis added).

Finally, in *Lac du Flambeau II,* the court found that the Wisconsin electorate amended their state's constitu-

tion to allow the state to operate a lottery. Based in part on an opinion by the Wisconsin Attorney General, the court concluded that Wisconsin no longer prohibited games ivolving prize, chance, and consideration, and ruled that all games falling within that category must be included in the compact negotiation. Thus, the court's ruling was limited to the specific category of games, albeit a broad category, no longer prohibited by Wisconsin. To some extent, the court in *Lac du Flambeau II* utilized a different interpretation of *Cabazon* than the one outlined above. For example, the court observed:

> If the policy is to prohibit all forms of gambling by anyone, then the policy is characterized as criminal-prohibitory and the state's criminal laws apply to tribal gaming activity. On the other hand, if the state allows some forms of gambling, even subject to extensive regulation, its policy is deemed to be civil-regulatory and it is barred from enforcing its gambling laws on the reservation.

This approach is broader than the one employed by the Supreme Court in *Cabazon* and other courts which have faced the same question and, to the extent the court in *Lac du Flambeau II* based its conclusion on that analysis, we decline to follow its lead.[1]

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[1] The Tribe has also argued that the *Lac du Flambeau II* decision controlled the ultimate outcome of the instant case. The Tribe asserted that the electorate's amendment of the Florida Constitution to permit a state-run lottery converted the State's public policy toward all forms of Class III gaming to one which is wholly regulatory in nature. We disagree. First, the Tribe's argument is premised on the notion that the Court may look only to the State's Constitution, and not to its statutory law or expressions by its populace, to discern the State's public policy toward gambling. The Tribe has cited nothing and we can find no support for that proposition. Second, as noted above, the thrust of *Cabazon* and its progeny requires a particularized inquiry into the proposed gambling activity (in this case, casino gambling and machine or computer-assisted gaming). For example, in *Cabazon,* where California ran a state lottery and permitted parimutuel betting, the

In sum, we can find no convincing support in these cases for the Tribe's suggestion that a state's public policy permitting individual Class III activities is somehow equivalent to permitting all Class III gaming activities. Indeed, two other courts recently reached the same conclusion regarding the "permits such gaming" language and Class III gaming activities. *See, Cheyenne River Sioux Tribe v. State of South Dakota, et. al.,* 1993 WL 316042, No. 93-1224/1521 (8th Cir. August 23, 1993) (Court upheld district court's ruling that state need not include traditional keno in compact negotiations when state only permitted video keno because the " 'such gaming' language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit.") *and Rumsey Indian Rancheria of Wintun Indians, et al. v. Governor Pete Wilson, et al.,* Case No. CIV-S-92-812-GEB at 16, n.16 (E.D. Cal. July 16, 1993) ("This court has found no authority for the proposition that a state's public policy construed as permitting a single Class III game must be found to permit all Class III gaming activities.") Thus, we look at the state's public policy toward the specific gaming activities proposed by the tribes.[2]

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lower courts and the Supreme Court looked at the state's public policy regarding bingo, the specific gambling activity at issue. Thus, we do not agree that *Lac du Flambeau II* dictates the outcome of the instant case, without a review of the State's public policy toward gambling in general and its public policy toward the specific gaming activities in question.

[2] In its motion for summary judgment, the State argued that the different language prefacing the Class II and Class III provisions should be the focus of the Court's analysis of the IGRA. The relevant portions of the IGRA state:

> An Indian tribe may engage in, or license and regulate, class II *gaming* on Indian lands within such tribe's jurisdiction, if—. . .
>
> (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity, . . .

and:

The Tribe has argued alternatively that Florida in fact permits precisely those types of Class III gaming activities which it proposes to operate on Tribal lands. The parties agree that the State explicitly permits parimutuel betting and the state lottery, both of which are Class III games. The Joint Pretrial Stipulation describes in detail these games. For example, there are thirty-five parimutuel facilities throughout the State, including dog and horse facing tracks and jai alai frontons. The State also permits simulcast and intertrack betting at the parimutuel facilities. Simulcast involves the transmission of an out-of-state race into Florida or an in-state race out of Florida for betting purposes. Intertrack betting involves the transmission of a race from one Florida parimutuel facility to another for betting purposes. The total amount bet at the State's thirty-five facilities has been 1.6 billion dollars for the past several years. (Joint Pretrial Stipulation at 5-6, ¶¶ 7-11).

> Class III gaming *activities* shall be lawful on Indian lands only if such *activities* are—. . .
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, . . .

25 U.S.C. § 2710(b)(1) and (d)(1) (emphasis added). The State argues that the use of the term "gaming activities" rather than "gaming" indicates a congressional intent that courts treat Class III as a particularized, rather than a generic group of activities, thereby requiring an activity-by-activity review of the proposed tribal gaming.

At least one court has concluded that this difference in prefatory language does not create a meaningful distinction between Class II and Class III under the IGRA. *See, Mashantucket Peguot Tribe v. State of Connecticut,* 913 F.2d 1024, 1030 n.6 (No significance should be accorded to the "modest difference" between the two introductory sections). Because we have concluded that the application of the *Cabazon* standard requires a court to examine the State's public policy regarding the specific activities proposed by the Tribe, we need not address the State's argument that the prefatory language creates an important distinction between the IGRA's Class II and Class III provisions. We add, however, that the purported distinction the State would draw between "gaming" and "gaming activities" appears illusory.

In addition to accepting bets placed at parimutuel facility windows staffed by facility employees, fifteen facilities use SAMS. SAMS are automated machines which permit a bettor to enter his bet by inserting money, vouchers, or credit cards into the machine, thereby enabling him to select the number or combination he wishes to purchase. A ticket is issued showing those numbers. Those numbers may be selected by bettors who handicap races or those who choose numbers or combinations without handicapping the race. A ticket showing a winning number or combination of numbers will entitle the holder to receive money in exchange for the ticket. (Joint Pretrial Stipulation at 6, ¶ 12).

Florida's state-wide lottery has a total in annual ticket sales of approximately two billion dollars. There are approximately 12,000 retail lottery sites throughout the State, and each retail site is operated by one or more persons trained by the State to operate the machine terminals which are installed at the sites. The on-line lottery games are Cash 3, Play 4, Fantasy 5, and Lotto. Each of these games uses machine terminals installed at the retail site. To play, a player selects his numbers either by marking the numbers of his choice or by marking the Quick Pick box on the play slip, a three by nine inch card which is inserted in the machine terminal. If Quick Pick is marked, the machine selects the numbers. In either event, the chosen numbers are transmitted to and recorded by the lottery's main computer in Tallahassee and the retail terminal prints out the lottery ticket containing the selected numbers. Alternatively, a player can verbally select either the numbers of his choice or the Quick Pick option to be entered into the machine by hand. Retailers and employees are permitted to operate machine terminals for their own purchases of lottery tickets. The winning numbers are chosen by an air blowing device which ensures the random selection of white numbered balls. A ticket showing a winning combination of numbers entitles the holder to receive money in exchange for the ticket. (Joint Pretrial Stipulation at 6-7, ¶¶ 13-16).

It is clear, therefore, that some Class III gaming is "not totally repugnant to" Florida's public policy, *Mashantucket,* 913 F.2d at 1031, as the State allows, although with regulations, parimutuel betting and the Florida lottery. The Tribe, however, argues that the State already permits precisely those Class III activities in which it wishes to engage. Specifically, the Tribe points to the State's alleged permission of charity casino nights, gambling cruises operated by foreign flag vessels out of Florida ports, and the use of computer or machine-assisted gaming in conjunction with parimutuel betting and the State lottery. The Tribe asserts that the State's permission of these activities indicates a regulatory, rather than a prohibitory, public policy toward these games, thereby making them mandatory subjects of negotiation between the Tribe and the State. Before addressing these arguments, it is helpful to examine Florida's public policy toward other types of Class III activities in order to place the Tribe's argument in its proper context.

The Florida penal code prohibits now, and has for many years barred a broad range of gambling activities. Fla. Stat. Anno. § 849.08 (West 1976) prohibits gambling in general, and provides:

> Whosoever plays or engages in any game at cards, keno, roulette, faro or other game of chance, at any place, by any device whatever, for money or other thing of value, shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

Other sections of the Florida penal code prohibit various activities associated with or attendant to gambling. For example, § 849.01 prohibits the keeping of a gambling house,[3] § 849.02 makes an individual acting as a "serv-

[3] Fla. Stat. Anno. § 849.01 (West 1976) states:

> Whoever by himself, his servant, clerk or agent, or in any other manner has, keeps, exercises or maintains a gaming table or room, or gaming implements or apparatus, or house, booth,

ant, clerk, agent, or employee" of a person in violation of § 849.01 guilty of the same offense,[4] § 849.03 prohibits the renting of a house or room for gambling purposes,[5] § 849.11 prohibits plays at games of chance by lot,[6] § 849.14 prohibits betting on the outcome of contest of skill,[7] and § 849.04 makes it illegal to allow a

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tent, shelter or other place for the purpose of gaming or gambling or in any place of which he may directly or indirectly have charge, control or management, either exclusively or with others, procures, suffers or permits any person to play for money or other valuable thing at any game whatever, whether heretofore prohibited or not, shall be guilty of a felony of the third degree, punishable as provided in § 775.082, or § 775.084.

[4] Fla. Stat. Anno. § 849.02 (West 1976) states:

Whoever acts as servant, clerk, agent, or employee of any person in the violation of § 849.01 shall be punished in the manner and to the extent therein mentioned.

[5] Fla. Stat. Anno. § 849.03 (West 1976) states:

Whoever, whether as owner or agent, knowingly rents to another a house, room, booth, tent, shelter or place for the purpose of gaming shall be punished in the manner and to the extent mentioned in § 849.01.

[6] Fla. Stat. Anno. § 849.11 (West 1976) states:

Whoever sets up, promotes or plays at any game of chance by lot or with dice, cards, numbers, hazards or any other gambling device whatever for, or for the disposal of money or other thing of value or under the pretext of a sale, gift, or delivery thereof, or for any right, share or interest therein, shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

[7] Fla. Stat. Anno. § 849.14 (West 1976) states:

Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of man or beast, or whoever receives in any manner whatsoever any money or other thing of value staked, bet or wagered, or offered for the purpose of being staked, bet or wagered, by or for any other person upon any such result, or whoever knowingly becomes the custodian or depositary of any money or other thing of value so staked, bet, or wagered upon any such result, or whoever aids, or

minor or mentally incompetent individual to gamble.[8] Section 849.05 makes the discovery of gambling devices prima facie evidence that the location where they were found is kept for the purposes of gambling.[9] Section 849.07 prohibits the use of billiards tables for gambling purposes.[10] In addition, § 849.231(1) prohibits the manufacture, sale, purchase, or possession of gambling de-

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assists, or abets in any manner in any of such acts all of which are hereby forbidden, shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

[8] Fla. Stat. Anno. § 849.04 (West Supp. 1993) states:

Whoever being the proprietor, owner or keeper of any E.O., keno ar pool table, or billiard table, wheel of fortune, or any other game of chance, kept for the purpose of betting, willfully and knowingly allows any minor or any person who is mentally incompetent or under guardianship to play at such game or to bet on such game of chance or whoever aids or abets or otherwise encourages such playing or betting of any money or other valuable thing upon the result of such game of chance by any minor or any person who is mentally incompetent or under guardianship shall be guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084. For the purpose of this section, a "mentally incompetent person" is one who because of mental illness, mental retardation, senility, excessive use of drugs or alcohol, or other mental incapacity is incapable of either managing his property or caring for himself or both.

[9] Fla. Stat. Anno. § 849.05 (West Supp. 1993) states:

If any of the implements, devices or apparatus commonly used in games of chance in gambling houses or by gamblers, are found in any house, room, booth, shelter or other place it shall be prima facie evidence that the said house, room, booth, shelter or other place where the same are found is kept for the purpose of gambling.

[10] Fla. Stat. Anno. § 849.07 (West 1976) states:

If any holder of a license to operate a billiard or pool table shall permit any person to play billiards or pool or any other game for money, or any other thing of value, upon such tables, he shall be deemed guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

vices,[11] § 849.26 provides that all gambling debts or contracts are void,[12] and § 849.12 provides for the forfeiture to the State of money and prizes won through illegal gambling.[13]

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[11] Fla. Stat. Anno. § 849.231(1) (West 1976) states:

> Except in instances when the following described implements or apparatus are being held or transported by authorized persons for the purpose of destruction, as hereinafter provided, and except in instances when the following described instruments or apparatus are being held, sold, transported, or manufactured by persons who have registered with the United States Government pursuant to the provisions of Title 15 of the United States Code, sections 1171 et seq., as amended, so long as the described implements or apparatus are not displayed to the general public, sold for use in Florida, or held or manufactured in contravention of the requirements of 15 U.S.C. § 1171 et seq., it shall be unlawful for any person to manufacture, sell, transport, offer for sale, purchase, own, or have in his possession any roulette wheel or table, faro layout, crap table or layout, chuck-a-luck wheel, bird cage such as used for gambling, bolita balls, chips with house markings, or any other device, implement, apparatus, or paraphernalia ordinarily or commonly used or designed to be used in the operation of gambling houses or establishments, excepting ordinary dice and playing cards.

[12] Fla. Stat. Anno. § 849.26 states:

> All promises, agreements, notes, bills, bonds or other contracts, mortgages or other securities, when the whole or part of the consideration if for money or other valuable thing won or lost, laid, staked, betted or wagered in any gambling transaction whatsoever, regardless of its name or nature, whether heretofore prohibited or not, or for the repayment of money lent or advanced at the time of a gambling transaction for the purpose of being laid, betted, staked or wagered, are void and of no effect; provided, that this acts shall not apply to wagering on pari-mutuels or any gambling transaction expressly authorized by law.

[13] Fla. Stat. Anno. § 849.12 (West 1976) states:

> All sums of money and every other valuable thing drawn and won as a prize, or as a share of a prize, or as a share, percentage or profit of the principal promoter or operator, in any lottery, and all money, currency or property of any kind to

Certain games which would otherwise be Class III games are exempted from this statutory scheme. These are limited, however, to games played in residences for less than $10,[14] drawings by chance held by charitable or-

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> be disposed of, or offered to be disposed of, by chance or device in any scheme or under any pretext by any person, and all sums of money or other thing of value received by any person by reason of his being the owner or holder of any ticket or share of a ticket in a lottery, or pretended lottery, or of a share or right in any such schemes of chance or device and all sums of money and other thing of value used in the setting up, conducting or operation of a lottery, and all money or other thing of value at stake, or used or displayed in or in connection with any illegal gambling shall be forfeited, and may be recovered by civil proceedings, filed, or by action for money had and received, to be brought by the Department of Legal Affairs or any state attorney, or other prosecuting officer, in the circuit courts in the name and on behalf of the state; the same to be applied when collected as all other penal forfeitures are disposed of.

[14] Fla. Stat. Anno. § 849.085 (West Supp. 1993) states:

> (1) Notwithstanding any other provision of law, it is not a crime for a person to participate in a game described in this section if such game is conducted strictly in accordance with this section.
>
> (2) As used in this section:
>
> (a) "Penny-ante game" means a game or series of games or poker, pinochle, bridge, rummy, canasta, hearts, dominoes, or mah-jongg in which the winnings or any player in a single round, hand, or game do not exceed $10 in value.
>
> (b) "Dwelling" means residential premises owned or rented by a participant in a penny-ante game and occupied by such participant or the common elements or recreational areas or a condominium or mobile home park of which a participant in a penny-ante game is a unit owner, or the facilities of an organization which is tax exempt under § 501(c)(7) of the Internal Revenue Code. The term "dwelling" also includes a college dormitory room or the common recreational area of a college dormitory or a publicly owned community center owned by a municipality or county.
>
> (3) A penny-ante game is subject to the following restrictions:

ganizations,[15] and promotions in connection with the sale

(a) The game must be conducted in a dwelling.

(b) A person may not receive any consideration or commission for allowing a penny-ante game to occur in his dwelling.

(c) A person may not directly or indirectly charge admission or any other fee for participation in the game.

(d) A person may not solicit participants by means of advertising in any form, advertise the time or place of any penny-ante game, or advertise the fact that he will be a participant in any penny-ante game.

(e) A penny-ante game may not be conducted in which any participant is under 18 years of age.

(4) A debt created or owed as a consequence of any penny-ante game is not legally enforceable.

(5) The conduct of any penny-ante game within the common elements or recreation area of a condominium or mobile home park or the conduct of any penny-ante game within the dwelling of an eligible organization as defined in subsection (2) or within a publicly owned community center owned by a municipality or county creates no civil liability for damages arising from the penny-ante game on the part of a condominium association, mobile home owner's association, dwelling owner, or municipality or county or on the part of a unit owner who was not a participant in the game.

[15] Fla. Stat. Anno. § 849.0935 (West Supp. 1993) states:

(1) As used in this section, the term:

(a) "Drawing by chance" or "drawing" means an enterprise in which, from the entries submitted by the public to the operator of the drawing, one or more entries are selected by chance to win a prize. The term "drawing" does not include those enterprises commonly known as "matching," "instant winner," or "preselected sweepstakes," which involve the distribution of winning numbers, previously designated as such, to the public.

(b) "Operator" means an organization qualified under 26 U.S.C. § 501(c)(3), and its agents, officers, or employees, which promotes, operates, or conducts a drawing by chance.

(2) The provision of § 849.09 shall not be construed to prohibit an organization qualified under 26 U.S.C. § 506(c)(3)

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from conducting drawings by chance, provided the operator has complied with all applicable provisions of chapter 496.

(3) All brochures, advertisements, notices, tickets, or entry blanks used in connection with a drawing by chance shall conspicuously disclose:

(a) The rules governing the conduct and operation of the drawing.

(b) The full name of the organization or operator, and its principal place of business.

(c) The source of funds used to award cash prizes or to purchase prizes.

(d) The date, hour, and place where the winner will be chosen, unless the brochures, advertisements, notices, tickets, or entry blanks are not offered to the public more than 3 days prior to the drawing.

(4) It is unlawful for any operator who, pursuant to the authority granted by this section, promotes, operates, or conducts a drawing by chance:

(a) To design, engage in, promote, or conduct any drawing in which the winner is predetermined by means of matching, instant win, or preselected sweepstakes or otherwise or in which the selection of the winners is in any way rigged;

(b) To require an entry fee, payment, proof of purchase, or contribution as a condition of entering the drawing or of being selected to win a prize;

(c) To arbitrarily remove, disqualify, disallow, or reject any entry or to discriminate in any manner between entrants who gave contributions to the operator and those who did not give such contributions;

(d) To fail to promptly notify, at the address set forth on the entry blank, any person whose entry is selected to win, of the fact that he has won;

(e) To fail to award all prizes offered in the manner and at the time stated; and

(f) To print, publish, or circulate literature or advertising material used in connection with the drawing which is false, deceptive, or misleading.

(5) Any operator who engages in any act or practice in violation of this section is guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083. How-

of consumer goods.[16]

These wide-ranging statutory prohibitions are not the only evidence of the State's public policy toward gam-

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ever, any operator or other person who sells or offers for sale in this state a ticket or entry blank for a raffle or other drawing by chance, without complying with the requirements of paragraph (3)(d), is guilty of a misdemeanor of the second degree, punishable by fine only as provided in § 775.083.

(6) This section does not apply to the state lottery operated pursuant to chapter 24.

[16] Fla. Stat. Anno. § 849.094 (West Supp. 1993) states in pertinent part:

(1) As used in this section, the term:

(a) "Game promotion" means, but is not limited to, a contest, game of chance, or gift enterprise, conducted within or throughout the state and other states in connection with the sale of consumer products or services, and in which the elements of chance and prize are present. However, "game promotion" shall not be construed to apply to bingo games conducted pursuant to § 849.0931.

(b) "Operator" means any person, firm, corporation, or association or agent or employee thereof who promotes, operates, or conducts a game promotion, except any charitable nonprofit organization.

(2) It is unlawful for any operator:

(a) To design, engage in, promote, or conduct such a game promotion, in connection with the promotion or sale of consumer products or services, wherein the winner may be predetermined or the game may be manipulated or rigged so as to:

1. Allocate a winning game or any portion thereof to certain lessees, agents, or franchises; or

2. Allocate a winning game or any part thereof to a particular period of the game promotion or to a particular geographic area;

(b) Arbitrarily to remove, disqualify, disallow or reject any entry;

(c) To fail to award prizes offered;

(d) To print, publish, or circulate literature or advertising material used in connection with such game promotions which is false, deceptive, or misleading; or

(e) To require an entry fee, payment, or proof of purchase as a condition of entering a game promotion.

bling. The State's voters have twice rejected referenda which would have legalized casino gambling. In 1986, the most recent referendum, the Florida electorate approved the State lottery by a two-to-one margin but rejected casino gambling by the same margin. (Defendants' Motion for Summary Judgment, Ex. #3). In addition, the Florida Legislature has failed to pass several bills over the past few years which would have permitted charity casino night activities. (Joint Pretrial Stipulation at 9, ¶ 20).

As noted above, the permission of parimutuel betting and the operation of the State lottery indicates that some Class III activities are not repugnant to the State. However, both the Legislature and the State electorate have evinced their unwillingness to allow all but a few forms of Class III activities and those which are allowed are subject to strict regulation. With this in mind, we turn now to the Tribe's argument that the State in fact permits precisely those Class III activities about which the State refused to negotiate.

The Tribe first argues that the failure to prosecute casino nights held by some Florida charities reflects the State's permission of casino gambling. The following facts are not in dispute. Over the past three years, certain Florida charities have conducted casino or Las Vegas nights. These events include the use of blackjack tables, roulette wheels, crap tables, and other casino-like equipment. The events' patrons make a contribution to the sponsoring charitable organization and are given casino-like chips to be used to play the available casino-style games. At the end of the evening, the players may then use their chips to purchase or bid on *gifts* which have been donated to or purchased by the charity. (Joint Pretrial Stipulation at 8, ¶ 17). The Tribe submitted a list under seal of twenty-nine casino nights held during the period 1990-1992. Of these events, fifteen were held in Broward County, four in Dade County, six in Palm Beach

County, and one in both Collier and Martin Counties.[17] On March 23, 1993, the Tribe submitted a list of four more such events held in Broward County.

Additionally, The Florida Attorney General's office has had ten to fifteen calls about charitable casino nights within the past four years, asking about events where there would be casino-like gambling. The Attorney General's office received information regarding names of firms offering to sponsor these events and passed that information to the appropriate local states' attorneys offices. The Attorney General's office never learned if any action was taken at the local level and did not follow up to determine if anything illegal was discovered. (Joint Pretrial Stipulation at 8, ¶ 18).

On July 22, 1991, the Florida Attorney General wrote to each of the twenty State Attorneys informing them of the Tribe's compact request and stating:

[17] To obtain this list, the Tribe initially filed a motion to compel, and later a renewed motion to compel, against the promoter of these events. The Court referred these motions to United States Magistrate Judge Ted E. Bandstra to resolve. On November 6, 1992, Magistrate Judge Bandstra granted the Tribe's renewed motion to compel. Subsequently, the Tribe and the events' promoter reached an agreement whereby the list of the events was filed under seal with the Court on November 27, 1992, pursuant to the Joint Stipulation of Resolution of Seminole Tribe of Florida's Motion to Compel and Plaintiff's Renewed Motion to Compel Testimony and Production from [the Promoter] and Withdrawal of Motion.

In the Tribe's Notice of Filing Under Seal a List of 29 Charitable Las Vegas Night Events accompanying the actual list, the Tribe indicated that in his order of November 6, 1992, Magistrate Judge Bandstra's found that the promoter faced no threat of prosecution based on the disclosure of the list of casino night events. We assume that the Tribe points this out to support its contention that a State Attorney's failure to prosecute casino night events constitutes permission of casino gambling. The promoter filed an objection to the characterization of Magistrate Judge Bandstra's order. We specifically disregard any suggestions in the Tribe's Notice, and take notice only of the contents of the list filed under seal.

> [The Tribe] may also attempt to establish full fledged gambling casinos. The Seminoles justify these proposed activities in part on the fact that "casino nights" or "Las Vegas nights" are openly conducted by various charitable and non-profit organizations in Florida despite the clear prohibition against such activity outlined in Chapter 849, Florida Statutes (1989). Of great concern to me is the perception among some members of the law enforcement community, including prosecutors, that Casino Night or Las Vegas Night activities are lawful. This is simply not true. The people of Florida have repeatedly rebuffed attempts to legitimize casino type gambling.

On at least two occasions prior to the State Attorney General's letter, State Attorneys had written letters providing opinions that permit casino or Las Vegas nights under certain circumstances. The above quoted letter from the Attorney General was prompted by one of those State Attorney letters. The Attorney General received responses from three other State Attorneys agreeing with and supporting the letter's statement that casino night activities are illegal. (Joint Pretrial Stipulation at 8, ¶ 18). The Attorney General's office, both present and past, has consistently taken the position, through formal and informal opinions, that casino night activities are illegal. (Joint Pretrial Stipulation at 8, ¶ 18.1). The parties have stipulated that the casino night activities described above are not generally prosecuted due to budgetary and manpower constraints and the exercise of prosecutorial discretion on the part of state attorneys. (Joint Pretrial Stipulation, ¶ 21).

The Tribe has argued that the failure to prosecute charitable casino nights by local state attorneys is analogous to the situation in *Mashantucket supra*. We disagree. The Tribe is correct that the *Mashantucket* case centered on the operation of casino night activities by charitable

organizations in Connecticut. However, in that case, Connecticut, unlike Florida, officially sanctioned the operation of casino nights by way of statute. In contrast, the Tribe relies only on the discretionary decision not to prosecute sporadic casino night activities to evince the State's permission of casino gambling activities, notwithstanding the State Legislature's clear prohibitory declaration in the promulgation of its penal code.

The prosecutorial discretion involved in the enforcement of crimes is certainly one component in a state's public policy. The capacity to discern public policy, however, from the discretionary exercise of prosecutorial power is exceedingly difficult. The undisputed facts evidencing a strong public policy against casino-type activities cannot be substantially undermined by occasional and sporadic decisions made on a local level not to prosecute a discrete casino night conducted by a charity, due to manpower, financial constraints, and higher criminal priorities. First, the State Attorney General has emphasized repeatedly and over extended periods of time, in formal and informal opinions, that these activities remain illegal [18], and the Florida penal code is plain and unam-

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[18] For example, in response to the question of whether a "Law [sic] Vegas" party staged by a fraternal organization for the benefit of a crippled children's home was legal, the State Attorney General responded:

> The gambling laws make no exceptions in favor of fraternal orders of persons who participate in gambling schemes operated by such orders, even when the ultimate beneficiary is a worthy one. Said laws bear upon everybody equally and take no cognizance of who is to benefit from the operation of gambling schemes.
>
> Therefore your question is answered in the negative because in my opinion the described "Las Vegas" party would violate the criminal laws of Florida.

Op. Att'y. Gen. 056-20 (1956). (Exh. I, Defendants' Motion for Summary Judgment). As noted above, the State Attorney General recently reaffirmed this position in a letter sent out to all State Attorneys. This letter, written in reaction to two opinions from local state attorneys that such activities were legal, states:

> Of great concern to me is the perception among some members of the law enforcement community, including prosecutors, that Casino Night or Las Vegas Night activities are lawful. This is simply not true. The people of Florida have repeatedly rebuffed attempts to legitimize casino type gambling.

(Joint Pretrial Stipulation at 9, ¶ 18).

biguous on its face prohibiting these activities. Indeed, the parties have stipulated that the "Attorney General's office, both present and past, has consistently taken the position through formal and informal opinions that casino night activities are illegal." (Joint Pretrial Stipulation at p. 9, ¶ 18.1).

Second, the State electorate and its representatives have continuously rejected attempts to legalize casino gambling. (Joint Pretrial Stipulation at 9, ¶ 20). For example, the State's voters twice rejected referenda to legalize casino gambling. Most recently, in 1986, a proposed amendment to the Florida Constitution to allow casino gambling in hotels of 500 rooms or more was defeated by a two-to-one margin. (Defendant's Motion to Summary Judgment, Ex. 9). In addition, charity casino nights have also been the subject of several bills in the Florida legislature, and none of the bills have passed. (Joint Pretrial Stipulation at 9, ¶ 20).

Finally, desuetude has been reejected as a general theory of legislation by the Florida Supreme Court. In *State v. Egan*, 287 So.2d 1 (Fla. 1973), the defendant was charged with the common-law offense of nonfeasance. The defendant was indicted pursuant to a Florida statute which explicitly adopted English common law in relation to crimes, with certain exceptions, as the law of the State. The trial court ruled that the statute in question was unconstitutional on the grounds of vagueness and obsolescence, and the Florida Supreme Court reversed. It is the Florida Supreme Court's discussion of the argument re-

garding the obsolescence of the state statute which is relevant to the instant case. In rejecting the argument that the infrequent use of common law crimes to prosecute individuals had caused those crimes to cease to exist, the Florida Supreme Court observed:

> Our answer to this line of argument is that a legislative enactment may be repealed only by further legislation and not by time or changed conditions. . . . Simply stated, the general rule is that a statute is not repealed by nonuse. The argument set forth in the order of the lower court may be a cogent one when addressed to the legislature, yet courts of justice cannot and do not recognize such a policy as a basis for their decision.

287 So.2d at 7. The Tribe's argument that the failure of local prosecutors to prioritize and prosecute sporadic and apparently infrequent casino night activities converts an activity expressly prohibited by the penal code of the State into one which is permitted by the public policy of the State resembles the argument presented to and rejected by the Florida Supreme Court.

The record before the Court consists of a total of some thirty-three events held in four countries over a three year period. In a state with sixty-seven counties and more than thirteen million inhabitants, we do not believe that this evinces a public policy permitting casino gambling, especially when contrasted with the State's unambiguous penal statutes, the consistent prohibitory opinions of the State Attorney General over time, and the repeated votes of the State's electorate and its legislators prohibiting and rejecting casino gambling. The most that can be said regarding charitable casino night activities in Florida is that some State Attorneys in some counties on some occasions have chosen to prosecute other crimes as having higher priority, rather than the sporadic casino night event, based on the resources available to them.

Based on the record before us, and viewing the evidence in the light most favorable to the Tribe, we do not believe that the sporadic decision to decline to prosecute the occasional casino night in a handful of Florida counties can be said to constitute the State's permission of casino gambling. The Florida Legislature has plainly pronounced the public policy of the State, the people of the State have recently spoken twice, and the State Attorney Generals have repeatedly and consistently pronounced in formal and informal opinions that such casino night activities are illegal. The overwhelming weight of the evidence presented does not support the Tribe's position.

The Tribe also points to the fact that cruise ships docked in Florida possess gambling devices and embark passengers from Florida ports for the purpose of providing casino gaming for those passengers and that this too evinces a public policy toward casino gambling which is regulatory, rather than prohibitory, in nature. Several of these ships provide only day cruises with no destination other than the high seas for gambling purposes. It is these cruises on which the Tribe grounds its argument. While Fla. Stat. Anno. § 849.231(1) (West 1976) prohibits the possession of gambling paraphernalia, the ships at issue are expressly exempted from the prohibition by Fla. Stat. Anno. § 849.231(3) (West Supp. 1993). (Joint Pretrial Stipulation at 9, ¶ 19). However, notably no gambling occurs nor is it permitted within the territorial bounds of the State.

The Tribe argues nevertheless that the State's collection of a tax on these cruises manifests a public policy of permitting casino gambling. The State collects the tax pursuant to Fla. Stat. Anno. § 212.02(1) (West Supp. 1993). That statute provides in pertinent part:

> The term "admissions" means and includes the net sum of money after deduction of any federal taxes for admitting a person or vehicle or persons to any

> place of amusement, sport, or recreation or for the privilege of entering or staying in any place of amusement, sport, or recreation, including, but not limited to, theaters, outdoor theaters, shows, exhibitions, games, races, or any place where charge is made by way of sale of tickets, gate charges, seat charges, greens fees, participation fees, entrance fees, or other fees or receipts of anything of value measured on an admission or entrance or length of stay or seat box accommodations in any place where there is any exhibition, amusement, sport, or recreation . . .

Section 212.04 provides, in pertinent part:

> (1)(a) It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who sells or receives anything of value by way of admissions.
>
> (b) For the exercise of such privilege, a tax is levied at the rate of 6 per cent of sales price, or the actual value received from, such admissions, which 6 per cent shall be added to and collected with all such admissions from the purchaser thereof . . .

Thus, the State collects a tax on these cruises pursuant to its broadly applicable admissions tax, a tax which applies to the many forms of amusement, sport, or recreation based in the State. The admissions tax is charged to customers of these cruises because these excursion tours are not considered "a transportation service." (Plaintiff's Supplemental Motion for Summary Judgment at 6). It should be observed, however, that the tax is not leveled at the gambling enterprise *per se, i.e.*, the amount of tax collected is wholly independent of the amount of gambling, if any, done on the high seas by an individual passenger. Indeed, a passenger who does not participate in the gambling activities offered onboard pays the same admissions tax as the passenger who does

participate. Moreover, the Tribe's interpretation of this tax in relation to the IGRA's requirements is overly broad. Each case interpreting the IGRA which found state permission of a Class III gaming activity presented some form of explicit legislative approval of the activity within the state's territory. The Tribe's theory would seem to place an affirmative duty on a state to eradicate means by which its citizens could legally gamble in other jurisdictions in order to demonstrate a public policy prohibiting Class III activities.[19] For the same reason, the Tribe's argument that the State's continued allowance of these cruises to use its ports must fail, especially in light of the fact that no gambling occurs within the State's boundaries. Thus, even when viewing the evidence before the Court in the light most favorable to the Tribe, we conclude that these cruises by foreign flag vessels cannot be fairly said to constitute permission of casino gambling by the State within the State and within the ambit of the IGRA.

Finally, we turn to the Tribe's argument that the State permits machine and computer-assisted gaming. The State's position is that Fla. Stat. Anno. §§ 849.15 and 849.16 (West & Supp. 1993) outlaw certain machines commonly known as slot machines. Therefore, this type of machine and computer-assisted gaming need not by [sic] included in the Tribe-State compact negotiations. The Tribe asserts that the machines used at some parimutuel facilities and in the operation of the Florida Lottery fall within the definition of Fla. Stat. Anno. § 849.16

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[19] A hypothetical may be illustrative. Imagine that an individual who owns casinos in New Jersey operated an airline with scheduled flights from Miami to Atlantic City for the sole purpose of bringing players to his halls. Passengers who bought their airplane tickets in Florida would pay the applicable sales tax to the State. Under the Tribe's theory, this would constitute the State's permission of gambling under the IGRA, a conclusion which is supported by neither the language of the IGRA nor the cases interpreting that statute.

(West Supp. 1993), and therefore the State "permits such gaming for any purpose by any person, organization or entity" within the meaning of 25 U.S.C. § 2710(d)(1)(B). The relevant statutes state in pertinent part:

> 849.16 Machines or devices which come within in provisions of law defined.—
>
> (1) Any machine or device is a slot machine or device within the provisions of this chapter if it is one that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin, or other object, such machine or device is caused to operate or may be operated and if the user, by reason of any element of chance or of any other out come of such operation unpredictable to him, may:
>
> (a) Receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value or which may be given in trade; . . .
>
> 849.15 Manufacture, sale, possession, etc., of coin-operated devices prohibited.—
>
> It is unlawful:
>
> (1) To manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to sell, rent, lease, let on shares, lend or give away, or permit the operation of, or for any person to permit to be placed, maintained, or used or kept in any room, space, or building owned, leased or occupied by him or under his management or control, any slot machine or device of any part hereof; or
>
> (2) To make or to permit to be made with any person any agreement with reference to any slot machine or device, pursuant to which the user

> thereof, as a result of any element of chance or other outcome unpredictable to him, may become entitled to receive any money, credit, allowance, or thing of value or additional chance or right to use such machine or device, or to receive any check, slug, token or memorandum entitling the holder to receive any money, credit, allowance or thing of value.

In *Eccles v. Stone,* 183 So. 628 (Fla. 1938) and *Deeb v. Stoutamira,* 53 So.2d 873 (Fla. 1951), the Florida Supreme Court offered some guidance in the interpretaiton of these statutes. In *Eccles,* the Florida Supreme Court reviewed the history of the two statutes. In 1935, the Florida Legislature legalized "all sorts of slot machines or coin-operated gambling devices," with the provision that the vote by the majority of a county's electorate could prohibit their use within that county. 183 So. at 631. As noted by the Court,

> Within two years the operation of slot machines in Florida had become so obnoxious to the citizens of this State that the people of a great majority of the counties in the State had voted overwhelmingly to prohibit the operation of all slot machine devices licensed under the 1935 Act being operated thereafter in their respective counties, and a great majority of the members of the legislature of 1937 were pledged to their constituency to enact laws which would abolish the operation of slot machines in Florida. The opposition to slot machines was the direct result of the baneful and destructive effect which the operation of those machines had had upon the morals of the people of Florida of all ages and classes. It is a matter of common knowledge, of which we must take judicial cognizance, that the lure to play the slot machine had become so great as to undermine the morals of many and to lead to the commission of or the indulgence in vices and crimes to procure the coins with which to play the machines.

So the legislature of 1937 carried out the mandate of the majority of the people of the State, and the members their pledges to their constituency, to pass acts which would prohibit the operation of coin-operated gambling devices in this State and enacted Chapter 18143 [*i.e.*, the instant statutes].

It is also a matter of common knowledge that pursuant to the passage of that act the popular slot machine with its set of pictured wheels, its alluring jackpot and its pull lever, generally known as the one-armed bandit, faded away from the public places and immediately in the places where they had stood were set up the mechanical horse races, marble pin games and other coin-operated mechanical devices, adapted and fit for fast, easy gambling; and it is a matter of common knowledge, of which we cannot plead ignorance, that these machines are generally used as gambling devices and that the gambling element is the principal lure which causes them to be played by the public.

183 So. at 631. In *Deeb,* the Florida Supreme Court stated that, to violate the statutes at issue in the instant case, the "element of unpredictability" must be "inherent" in the machine itself. 53 So.2d at 874. Thus, the unpredictable outcome or chance, upon which the money or prize is awarded, must be part of the machine's operation. A review of the SAMS and lottery ticket machines indicates that they do not need [sic] this criterion.

Specifically regarding the SAMS, the description of these machines found in the Joint Pretrial Stipulation reveals that they are the automated equivalent of placing a bet at a live teller's window. Similarly, the lottery terminals operate as recording and ticketing devices, necessary in order to keep track of the individual combinations entered throughout the state. Neither type of machine falls within the scope of the legislative intent as recounted by the Florida Supreme Court in *Eccles.* More generally,

however, the Tribe attempts to read out of the statute the phrase "such machine . . . is caused to operate . . . and if the user, by reason or any element of chance or of any other outcome of such operation unpredictable by him, may" received money or a thing of value. Both the statutory language and *Deeb* indicate that the unpredictable event or element of chance which determines the winner must be linked to the machine's operation. Thus, the winner at a parimutuel facility is determined by the dog or horse race, not by the operation of the SAMS machines. Similarly, the winner of the State Lottery is determined by the weekly drawing in Tallahassee, not by the operation of the individual lottery ticket terminals.

In support of its position, the Tribe refers to *Rumsey Indian Rancheria of Wintun Indians, et al. v. Governor Pete Wilson, et al.,* Case No. CIV-S-92-812-GEB (E.D. Cal. July 16, 1993). We find the *Rumsey* case unpersuasive as applied to the particular facts of this case. In *Rumsey,* the Indian tribes argued that they were "entitled to play the electronic games on Indian land regardless of whether the equipment used may be deemed illegal slot machines so long as the State sponsors an identical type of game." *Rumsey* at 17. Thus, the tribes in *Rumsey* advocated a game-by-game evaluation of the electronic games they proposed. In contrast, in the instant case, the Tribe argues that the State's alleged permission of specific machines which violate Fla. Stat. Anno. § 849.16 (West Supp. 1993) make machine or computer-assisted games of any type mandatory subjects of negotiation. This parallels the Tribe's earlier argument, which we rejected, that the permission of one type of Class III activity places all types of Class III activity on the negotiation table. In addition, in *Rumsey,* the court observed that "State has authorized the State Lottery to operate electronic games virtually identical to the electronic games requested by the Tribes" and that "it appears that equipment similar if not identical to that proposed by the Tribes is currently employed by the State in its electronic gaming operations." *Rumsey* at 18.

In the instant case, the Tribe has made no such argument and the undisputed facts compel a different conclusion. The Tribe's proposal to the State indicated that it seeks to use machine or computer-assisted games to duplicate poker, bingo, pull-tabs, lotto, punch boards, tip jars, instant bingo, or other games (Joint Pretrial Stipulation at 4, ¶ 2), games which are clearly not identical to the SAMS and lottery ticket machines. Thus, the court's conclusion in *Rumsey* that the tribes should be allowed to negotiate regarding the operation of electronic games "virtually identical" to electronic games operated by the California Lottery is not opposite to the instant case on the record presented to the Court.

Based on the record before the Court, and viewing all evidence in a light most favorable to the Tribe, we conclude that the State does not permit the operation of gambling devices in contravention to Fla. Stat. Anno. §§ 495.15 and 495.16 (West 1976 & Supp. 1993) and that the machine or computer-assisted games proposed by the Tribe are not mandatory subjects of negotiation under the IGRA.

In conclusion, it is the holding of the Court first that the IGRA does not require all Class III gaming activities to be included in compact negotiations merely because the State permits specific Class III gaming activities in some form; and second that, contrary to the Tribe's argument, the State does not permit those specific types of Class III gaming activities which it now seeks to include in the Tribe-State compact negotiations. Having concluded that these proposed Class III activities need not be included in the compact negotiations, we hold that the State has not violated the IGRA's good faith requirement by refusing to include them in the negotiations. Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment is GRANTED and the Plaintiff's Motion for Summary Judgment and Supplemental Motion for Summary Judgment are DENIED. It is further

ORDERED AND ADJUDGED that the Defendant shall submit a proposed order of final judgment within fifteen (15) days of the date of this Order.

DONE AND ORDERED in Miami, Florida this 22 day of September, 1993.

/s/ Stanley Marcus
STANLEY MARCUS
United States District Judge
Southern District of Florida

cc: Counsel of record

APPENDIX D

[Filed Apr. 28, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-5256

SEMINOLE TRIBE OF FLORIDA,
Plaintiff-Appellant,

versus

STATE OF FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES; LAWTON CHILES,
Governor of the State of Florida,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Appellant's motion to continue stay of this appeal pending disposition of pending petition for writ of certiorari in appeal No. 92-4652 is granted.

/s/ Harold B. Tjoflat
Chief Judge

APPENDIX E

[Filed Apr. 28, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-4652

SEMINOLE TRIBE OF FLORIDA,
Plaintiff-Appellee,

versus

STATE OF FLORIDA; LAWTON CHILES,
Governor of the State of Florida,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Appellee's motion to stay issuance of the mandate pending petition for writ of certiorari is granted.

/s/ Harold B. Tjoflat
Chief Judge

APPENDIX F

[Filed Apr. 6, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-4652

SEMINOLE TRIBE OF FLORIDA,
Plaintiff-Appellee,

versus

STATE OF FLORIDA; LAWTON CHILES,
Governor of the State of Florida,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, BLACK, Circuit Judge, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Harold B. Tjoflat
Chief Judge

APPENDIX G

STATUTORY PROVISIONS

§ 2710. Tribal gaming ordinances

(a) Exclusive jurisdiction of Class I gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of Class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than—

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management conducted on an ongoing basis; and

(ii) includes—

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if—

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan ap-

proved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if—

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenue is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian

Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which—

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information,

and after a hearing if requested by the tribe, that the tribe has—

(A) conducted its gaming activity in a manner which—

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for—

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and ecomically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation—

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706(b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsec. (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant ot section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the trial governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711 (e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming actiivty is published in the Federal Register may, during the 1-year period beginning

on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The proviisons of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to enegotiate such a compact or did not respond to such a request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A) (i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indiain tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates—

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved,

or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

(Pub.L. 100-497, § 11, Oct. 17, 1988, 102 Stat. 2472.)

Supreme Court, U.S.
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No. 94-12

IN THE

Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner

v.

STATE OF FLORIDA and LAWTON CHILES, Governor,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Respondent agrees that the instant decision is in direct conflict with the opinion of the Eighth Circuit Court of Appeals in *Cheyenne River Sioux Tribe v. South Dakota,* 3 F. 3d 273 (8th Cir. 1993). In the time since the filing of the Seminole Tribe's instant petition for *certiorari*, the Ninth Circuit Court of Appeals has rendered its opinion in Spokane Tribe of Indians v. Washington State, ___ F. 3d ___, 1994 WL 316443 (9th Cir. 1994). The *Spokane* case is in direct conflict with the decision of the 11th Circuit below and explicitly recognizes it as such. *Id.* at *1. The conflicts among the circuits and the several district court cases cited by the petitioner which also show a pronounced split indicate that this is an unanswered question of importance which should be decided by this court.

Having acknowledged that this court should address the question of Congress' power to abrogate the states' 11th Amendment immunity pursuant to the Indian Commerce Clause, Art. I, § 8, cl. 3, the Respondents do not accede to the arguments of the Petitioner. Respondents assert that the court below properly found that Congress lacked the referenced power. In addition, Respondents dispute the Petitioner's second and third issues in its argument. The court below properly limited the holding in *Pennsylvania v. Union Gas,* 491 U.S. 1 (1989), to the Interstate Commerce Clause and it properly rejected the application of the exceptions set forth in *Ex parte Young,* 209 U.S. 123 (1908).

The Petitioner makes reference to the remedy set forth in part V of the opinion of the court below. (Pet. at 6) That portion of the opinion is the subject of a cross-petition

contemporaneously filed with this response.[1] The Ninth Circuit in Spokane addresses this remedy and adds to the conflict in the circuits by disapproving it. *Spokane*, 1994 WL 316443 at *6. The issues raised in the cross-petition add to the need for this court to grant *certiorari* in this case.

Rather than respond to Petitioner's arguments on the merits of this case at this juncture, Respondents intend to reserve the right to raise all substantive arguments in opposition to the Petitioner's claims in their answer brief on the merits.

Respectfully submitted,

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1 These issues are also raised inan original Petition for *Certiorari* filed by the State of Alabama. *State of Alabama v. Poarch Band Indians*, docket number 94-35 (filed July 5, 1994)

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(5)

No. 94-12

SUPREME COURT, U.S. LIBRARY
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In The

Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

vs.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF FLORIDA,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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A RECENT DECISION OF THE TENTH CIRCUIT PRESENTS ADDITIONAL CONFLICT WITH THE DECISION BELOW

Subsequent to the filing of the Petition for Writ of Certiorari in this case, the United States Court of Appeals for the Tenth Circuit decided *Ponca Tribe of Oklahoma v. State of Oklahoma*, No. 92-6331, ___ F.3d ___, 1994 WL 476316 (10th Cir. 1994), which held that pursuant to the Indian Commerce Clause, Congress has the power to abrogate the states' Eleventh Amendment immunity:

> [W]e conclude that the Indian Commerce Clause empowers Congress to abrogate the states' Eleventh Amendment immunity and that IGRA constitutes an unequivocal expression of Congress' intent to do so.

1994 WL 476316 at * 9.

The Tenth Circuit noted express conflict with the Eleventh Circuit:

> We therefore decline to follow that portion of the Eleventh Circuit's recent ruling in *Seminole Tribe of Florida*, 11 F.3d at 1028, which concluded that Congress lacks the power to abrogate Eleventh Amendment immunity in IGRA.

Id. at * 14 n. 12.

Thus, the Tenth Circuit in *Ponca Tribe* joined the Eighth and Ninth Circuits, *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273 (8th Cir. 1993); *Spokane Tribe v. Washington*,

28 F.3d 991 (9th Cir. 1994), in concluding that the Indian Commerce Clause permits Congress to abrogate states' Eleventh Amendment immunity. The Eighth Circuit conflict with the *Seminole Tribe* decision of the Eleventh Circuit was addressed in the *Seminole* Petition. (*See* Petition for Writ of Certiorari at p.7). The Ninth Circuit conflict occurred after the Petition was filed, and was noted in the response to the *Seminole* Petition.

Ponca Tribe presents further evidence of the substantial conflict among the circuits. The Tenth Circuit decision adds support for review in this case.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA, PETITIONER

v.

STATE OF FLORIDA, ET AL.

STATE OF ALABAMA, ET AL., PETITIONERS

v.

POARCH CREEK INDIANS

POARCH BAND OF CREEK INDIANS, CROSS-PETITIONER

v.

STATE OF ALABAMA, ET AL.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF FLORIDA, ET AL., CROSS-PETITIONERS

v.

SEMINOLE TRIBE OF FLORIDA

ON PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2710(d)(7), provides federal courts with jurisdiction over claims by Indian Tribes that States have failed to negotiate gaming compacts in good faith. The questions presented are:

1. Whether Congress has authority under the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution, to abrogate a State's immunity from suit.

2. Whether the doctrine of *Ex parte Young* permits a suit against a state governor arising from a State's failure to negotiate an Indian gaming compact in good faith.

3. Whether, if a suit to require a State and its governor to negotiate a gaming compact is precluded by sovereign immunity, the Secretary of the Interior has statutory authority under IGRA to prescribe regulations governing Indian gaming.

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In the Supreme Court of the United States

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ON PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In 1987, this Court held that neither Public Law 280 (18 U.S.C. 1162) nor any other provision of federal law authorized California to enforce its gaming laws with respect to bingo and card games conducted by Indian Tribes, because state law regulated rather than prohibited such gaming. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). That decision left much Indian gaming unregulated by the States. 94-12 Pet. App. 3a. At the same time, federal law did not provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. 2701(3). In an attempt to fill that void, Congress in 1988 enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701 *et seq.*

IGRA's purpose was "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). Congress simultaneously sought to "shield [Indian gaming] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. 2702(2). To fulfill those purposes, IGRA divides gaming into three classes, each of which is regulated differently.

Class I gaming, over which Indian Tribes exercise exclusive regulatory control, consists of social games for prizes of minimal value and traditional games engaged in as part of tribal ceremonies. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming consists of bingo, other games similar to bingo (when played in the same location), and non-banking card games. 25 U.S.C. 2703(7). Indian Tribes maintain regulatory jurisdiction over

class II gaming, see 25 U.S.C. 2710(a)(2), subject to the supervision of the National Indian Gaming Commission (an entity within the Department of the Interior). 25 U.S.C. 2704. An Indian Tribe may engage in class II gaming if: (1) the State in which the gaming is located "permits such gaming for any purpose by any person," (2) such gaming is not prohibited on Indian lands by federal law, and (3) the gaming is conducted pursuant to a tribal ordinance that satisfies specified statutory requirements and is approved by the Chairman of the Commission. 25 U.S.C. 2710(b).

Class III gaming, at issue here, is gaming that does not fall within class I or class II, and includes banking card games, casino games, slot machines, horse racing, dog racing, jai alai, and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming is lawful only if it is: (1) authorized by a tribal ordinance that satisfies the requirements in 25 U.S.C. 2710(b) for class II gaming and is approved by the Chairman of the Commission; (2) located in a State that permits such gaming; and (3) conducted in conformance with a compact between the Indian Tribe and the State. 25 U.S.C. 2710(d)(1). To facilitate the formation of a tribal-state compact, IGRA provides that, upon request by the Tribe, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. 2710(d)(3)(A).

Congress provided for judicial consideration of a Tribe's allegation that a State has failed to negotiate a tribal-state compact in good faith. Under 25 U.S.C. 2710(d)(7)(A)(i), "[t]he United States district courts shall have jurisdiction over * * * any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact * * * or to conduct such negotiations in good faith." A

Tribe may initiate such a cause of action 180 days after requesting the State to enter into negotiations. 25 U.S.C. 2710(d)(7)(B)(i). In such a suit, the Tribe must initially introduce evidence that a tribal-state compact has not been concluded and that the State did not respond to the request to negotiate or did not respond in good faith. 25 U.S.C. 2710(d)(7)(B)(ii). Once such evidence is introduced, "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith." 25 U.S.C. 2710(d)(7)(B)(ii).

If the district court finds that the State has failed to negotiate in good faith, "the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. 2710(d)(7)(B)(iii). If the parties fail to conclude a tribal-state compact within that 60-day period, the Tribe and the State each must submit a proposed compact to a mediator appointed by the district court. 25 U.S.C. 2710(d)(7)(B)(iv). The mediator then is to select the compact "which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." *Ibid.* Once the mediator submits the selected compact to the State and the Tribe, the State has 60 days in which to consent. 25 U.S.C. 2710(d)(7)(B)(v) and (vi).

If the State consents within the 60-day period to the compact selected by the mediator, the compact shall be treated as a tribal-state compact entered into by agreement pursuant to 25 U.S.C. 2710(d)(3). See 25 U.S.C. 2710(d)(7)(B)(vi). If the State does not consent, "the mediator shall notify the Secretary [of the Interior] and the Secretary shall prescribe, in consultation with the Indian tribe, procedures [for class III gaming] * * * which are consistent with the proposed compact selected by the mediator * * *, the provisions of [IGRA], and the

relevant provisions of the laws of the State." 25 U.S.C. 2710(d)(7)(B)(vii).

2. In January 1991, the Seminole Tribe of Florida requested the State of Florida to commence negotiations for a compact governing gaming operations proposed by the Tribe. 94-12 Pet. App. 44a. The State was willing to negotiate concerning card games, raffles, and pari-mutuel wagering on dog racing, horse racing, and jai alai. The State refused, however, to negotiate over any form of casino gambling. For that reason, negotiations broke down. *Id.* at 45a.

In December 1991, the Tribe filed suit in the United States District Court for the Southern District of Florida against the State and its Governor. 94-12 Pet. App. 26a. The Tribe alleged that the State had failed to conduct good faith negotiations as required by 25 U.S.C. 2710(*d*)(3)(A). The Florida defendants filed a motion to dismiss on the ground that the Eleventh Amendment barred federal court jurisdiction over the suit. 94-12 Pet. App. 26a, 28a. The district court denied the motion to dismiss. It held that "Congress did in fact abrogate the States' immunity when it enacted IGRA, and * * * that, pursuant to the Indian Commerce Clause, Congress plainly had the constitutional power to abrogate." 94-12 Pet. App. 30a.

3. In July 1990, the Poarch Band of Creek Indians requested the Governor of Alabama to negotiate a compact to govern class III gaming. 94-189 Cross-Pet. 4. The State offered to negotiate concerning pari-mutuel wagering on horse, dog and simulcast races, out refused to negotiate concerning casino gambling. 94-35 Pet. 6-7. An impasse in the negotiations resulted. *Ibid.*

In September 1991, the Poarch Band filed suit against the State of Alabama and its Governor in the United States District Court for the Southern District of

Alabama. 94-35 Pet. App. B6. The Alabama defendants filed a motion to dismiss based on sovereign immunity. *Id.* at B8. The district court granted that motion. The court acknowledged that "IGRA clearly expresses Congress' intention to allow states to be sued by Indian tribes in federal court." *Id.* at B31. It held, however, that "Congress does not have the power to abrogate a state's Eleventh Amendment immunity when enacting legislation pursuant to its power found in the Indian Commerce Clause." *Id.* at B36-B37. In a separate order, the district court also dismissed the Tribe's claim against the Governor on sovereign immunity grounds. *Id.* at C1-C9.

4. The court of appeals consolidated the Florida and Alabama cases for purposes of appeal. The court agreed with both district courts that "Congress intended to abrogate the states' sovereign immunity." 94-12 Pet. App. 15a. It reasoned that "unless Congress intended to abrogate the states' immunity," the grant of jurisdiction in 25 U.S.C. 2710(d)(7)(A)(i) over claims that a State has not negotiated in good faith "would be of no effect." 94-12 Pet. App. 14a-15a.

The court went on to hold, however, that Congress lacks power under the Indian Commerce Clause of the Constitution (Art. I, § 8, Cl. 3) to abrogate a State's immunity from suit. The court of appeals acknowledged that *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), held that Congress has the power under the Interstate Commerce Clause to abrogate a State's immunity from suit. 94-12 Pet. App. 18a-20a. The court concluded, however, that *Union Gas* was distinguishable for two reasons. *Id.* at 20a-22a.

First, the court noted that although Congress's "plenary powers under the Interstate Commerce Clause * * * allow Congress to place limits on the states in

order to 'maintain[] free trade among the States, * * * the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.'" 94-12 Pet. App. 21a (quoting *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989)). For that reason, the court concluded, "the unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* cannot be extended to the Indian Commerce Clause." 94-12 Pet. App. 21a. Second, the court observed that "the Court has allowed federal jurisdiction over states only when the states partake in an activity typical of private individuals." *Id.* at 22a. Viewing the negotiations contemplated by IGRA as within "the typical realm of state authority," the court concluded that "the principles of federalism and sovereign immunity exemplified in the Eleventh Amendment prevent congress from abrogating the states' immunity." *Ibid.*

The court of appeals next held that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), does not permit a suit against a State's governor to require good faith negotiations under IGRA. The court found the *Ex parte Young* doctrine inapplicable because it viewed negotiation of a compact under IGRA as discretionary and because it viewed a suit against the governor under IGRA as "in reality * * * against the State itself." 94-12 Pet. App. 23a-24a. The court reasoned that IGRA "uniformly addresses itself to 'the State'; not once does it impose duties or responsibilities on a particular officer of the state." *Ibid.*

Finally, the court discussed the question of "what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit." 94-12 Pet. App. 25a. Relying on the severability clause in IGRA (25 U.S.C. 2721), the

court expressed the view that if a State pleads an Eleventh Amendment defense and the case is dismissed, the Tribe "may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state." *Ibid.* At that point, the court continued, "[t]he Secretary then may prescribe regulations governing class III gaming on the tribe's lands." *Ibid.*

Having held that sovereign immunity precluded suit under IGRA against a State or its governor without the State's consent, the court reversed the district court's decision in the Florida case and remanded with directions to dismiss the suit. 94-12 Pet. App. 25a. The court affirmed the order of dismissal in the Alabama case. *Ibid.*[1]

DISCUSSION

The tribal petitioners in Nos. 92-12 and 94-189 seek review of the court of appeals' holding that Congress lacks power under the Indian Commerce Clause to subject States to suit under the Indian Gaming Regulatory Act, 25 U.S.C. 2710(d)(7). Review of that ruling is warranted because the court of appeals has, in essence, held an Act of Congress unconstitutional, and because its decision conflicts with the decisions of three other courts of appeals that have sustained the power of Congress to provide for the type of suit at issue here.

The tribal petitioners also seek review of the court of appeals' holding that an Indian Tribe may not bring a

[1] While the appeal from the order denying the motion to dismiss the Florida case was pending in the court of appeals, the district court granted summary judgment on the merits in favor of Florida, finding that it had negotiated in good faith. The Seminole Tribe has appealed from that judgment, but its appeal has been stayed pending the outcome of the Tribe's petition here. 94-12 Pet. App. 84a.

suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against the governor of a State arising from the State's failure to negotiate in good faith. Because a decision in the Tribe's favor on that issue might obviate the need for a resolution of the broader constitutional question, the Court should grant the Tribe's petition on the *Ex parte Young* question as well.

The state petitioners in Nos. 94-35 and 94-219 seek review of the court of appeals' expression of the view that, if a State does not consent to suit by a Tribe, the Secretary of the Interior would have authority to prescribe regulations to govern the conduct of gaming on the Tribe's Indian lands. That discussion in the opinion below is dicta, since the court ordered the case dismissed on sovereign immunity grounds, and the question does not in any event warrant plenary review at this time. We therefore suggest that the Court hold the States' petitions raising that issue pending its decision in Nos. 94-12 and 94-189.

1. a. Section 2710(d)(7)(A)(i) of IGRA provides that "[t]he United States district courts shall have jurisdiction over * * * any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact [regulating class III gaming] * * * or to conduct such negotiations in good faith." 25 U.S.C. 2710(d)(7)(A)(i). Although the court of appeals correctly interpreted this jurisdictional provision as manifesting Congress's intent to abrogate a State's immunity from suit,[2] it

[2] Compare *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 786-788 (1991) (holding that 28 U.S.C. 1362 does not manifest a sufficiently clear congressional intent to abrogate state sovereign immunity in suit by Tribe).

concluded that Congress lacked authority under the Indian Commerce Clause to accomplish such an abrogation. Thus, the court essentially held 25 U.S.C. 2710(d)(7)(A)(i) unconstitutional.

That holding conflicts with the holdings of the Eighth, Ninth, and Tenth Circuits. All three of those courts have upheld the constitutionality of 25 U.S.C. 2710(d)(7)(A)(i), reasoning that Congress has the power under the Indian Commerce Clause to abrogate a State's immunity from suit. *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273, 280-281 (8th Cir. 1993); *Spokane Tribe of Indians* v. *Washington*, 28 F.3d 991, 995-997 (9th Cir. 1994), petition for cert. pending, No. 94-357 (filed Aug. 29, 1994); *Ponca Tribe of Oklahoma* v. *Oklahoma*, 37 F.3d 1422, 1427-1432 (10th Cir. 1994), petitions for cert. pending, Nos. 94-1029 & 94-1030 (filed Dec. 9, 1994). Review is warranted to resolve that circuit conflict regarding the constitutionality of Section 2710(d)(7)(A)(i).

b. The constitutionality of 25 U.S.C. 2710(d)(7)(A)(i) follows from this Court's decision in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), which sustained the power of Congress under the Interstate Commerce Clause to provide for suits against States. In light of Congress's special powers and responsibilities with respect to Indians, "Congressional power pursuant to the Indian Commerce Clause * * * cannot be less than its authority under the Interstate Commerce Clause." *Spokane Tribe*, 28 F.3d at 997.

In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court held that Congress has power under Section 5 of the Fourteenth Amendment to abrogate a State's immunity from suit. The Court explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of

the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." 427 U.S. at 456. In *Union Gas*, the Court held that Congress also has authority under the Interstate Commerce Clause to abrogate a State's immunity from an action for money damages. A plurality of the Court reasoned that, "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States." 491 U.S. at 16. "It cannot be relevant," the plurality continued, "that the Fourteenth Amendment accomplishes this exchange in two steps (§§ 1-4, plus § 5), while the Commerce Clause does it in one." *Id.* at 16-17. According to the plurality, "[t]he important point, rather, is that the provision both expands federal power and contracts state power; that is the meaning, in fact, of a 'plenary' grant of authority." *Id.* at 17.[3]

It follows a *fortiori* from *Union Gas* that Congress may provide for a suit by an Indian Tribe against a State. The United States' power over Indian affairs derives from the Commerce Clause of the Constitution (Art. I, § 8, Cl. 3), the Clauses reserving the Treaty powers to the President and the Senate (Art. II, § 2, Cl. 2); and "from the necessity of giving uniform protection to a dependent people." *Williams* v. *Lee*, 358 U.S. 217, 219 n.4 (1959), citing *United States* v. *Kagama*, 118 U.S. 375 (1886). Congress's power to regulate Indian commerce is rooted

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[3] Justice White expressed his agreement with the conclusion reached by the plurality "that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States," but stated that he "d[id] not agree with much of [the plurality's] reasoning." 491 U.S. at 57 (White, J., concurring in the judgment in part and dissenting in part). Justice White did not offer any additional reasoning.

in the same Clause as its power to regulate interstate commerce, and there is no reason for concluding that its power to provide for suits against States is any less under the Indian component of that Clause than it is under the interstate component. As this Court stated in *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989), the Indian Commerce Clause confers on Congress the "plenary power to legislate in the field of Indian affairs."

Indeed, one of the key deficiencies of the Articles of Confederation was that they divided authority over Indian affairs between the States and the central government. Article IX of the Articles of Confederation provided that "[t]he United States in Congress assembled" shall have the "sole and exclusive right" of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." James Madison viewed that attempted division of sovereign authority as an "endeavor to accomplish impossibilities," because it sought "to reconcile a partial sovereignty in the Union, with complete sovereignty in the States." The Federalist No. 42, at 268-269 (C. Rossiter ed. 1961). The division of authority also proved unsatisfactory in practice, because the proviso was relied upon by Georgia and North Carolina to treat with the Indians regarding their land and other objects and thereby "to annul the power itself." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). In response to those difficulties—and to the resulting potential for individual States to undermine the security of the United States and the States' collective commitment to the Indians—a committee of the Continental Congress submitted a report in August 1787, while the Constitutional Convention was sitting.

The committee recommended that if the States did not cede the Indian territory within their borders to the United States, they should "accede to Congress's managing, exclusively, all affairs with the Cherokees, Creeks, and other independent tribes within the limits of the said states, so that Congress, in either case, may have the acknowledged power of regulating trade, and making treaties with those tribes, and of preventing on their lands, the intrusions of the white people." 4 J. Amer. Cong. 767 (Way & Gideon ed. 1823); see *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 559. The Framers embraced the latter solution, and, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (*Oneida II*); see also *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 561 ("[t]he whole intercourse between the United States and this [Indian] nation, is, by our constitution and laws, vested in the government of the United States").

c. The court of appeals acknowledged that *Union Gas* is the closest precedent, but then sought to distinguish it on two grounds. 94-12 Pet. App. 18a-22a. Neither is persuasive.

First, the court observed that the Interstate Commerce Clause and the Indian Commerce Clause have different purposes: Whereas the Interstate Commerce Clause allows Congress to place limits on the States to "maintain[] free trade among the States * * *, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." 94-12 Pet. App. 21a (quoting *Cotton Petroleum*, 490 U.S. at 192). Those different purposes, however, have no bearing on the issue in this case. In particular, they do not suggest that Congress lacks the power under the latter Clause that *Union Gas*

sustained under the former. To the contrary, Congress's unique power with respect to Indians, its authority and practice of protecting Tribes against state encroachments, and the historical and textual parallels between relations with Indian Tribes and relations with foreign nations, suggest that Congress has the same or greater power to abrogate state immunity from suit under the Indian Commerce Clause.

The court of appeals also sought to distinguish this Court's precedents on the ground that they involved situations in which Congress authorized suits against a State when a State was engaged in an activity "typical of private individuals" and "outside the typical realm of state authority." 94-12 Pet. App. 21a-22a. This Court's precedents do not support such a restricted view of Congress's power under the Clauses of the Constitution that permit it to authorize suits against States. In *Fitzpatrick*, the activity engaged in by the State—employing workers to carry out governmental functions—was within the traditional sphere of state authority. In rejecting the State's claim of immunity from suit in that case, the Court made clear that the nature of the State's activity was irrelevant to the constitutional inquiry. 427 U.S. at 452. And in *Union Gas*, the nature of the State's activity—owning a hazardous waste site—was not mentioned as a factor in the decision. The important factor in *Fitzpatrick* and *Union Gas* was that the States had ceded a portion of their traditional authority when they gave Congress the power to enforce the Fourteenth Amendment and to regulate interstate commerce. As we have explained above, the States, in adopting the Constitution, also unequivocally ceded whatever authority they previously had to regulate Indian affairs.

In any event, the court of appeals erred in characterizing state negotiations with Indian Tribes as within the traditional sphere of state authority. 94-12 Pet. App. 22a. The Constitution assigns the power to make Treaties (including those with Indian Tribes) to the national Government (Art. II, § 2, Cl. 2), and agreements by States with Tribes historically were accomplished under federal auspices. See, *e.g.*, *Oneida II*, *supra*. IGRA is consistent with that constitutional arrangement.

2. The tribal petitioners also challenge the court of appeals' holding that a suit cannot be brought under the doctrine of *Ex parte Young* against the governor of a State arising from the failure by the State to engage in good faith negotiations under IGRA. Under the doctrine of *Ex parte Young*, sovereign immunity does not preclude a suit against a state official for prospective relief designed to vindicate federal law. See *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 104-106 (1984). The tribal petitioners have sought such relief here: They have each sought prospective relief to require the governor to carry out the State's obligation under federal law to negotiate a compact in good faith.

The court of appeals concluded that *Ex parte Young* was inapplicable because negotiating a compact is discretionary. 94-12 Pet. App. 23a-24a. Under IGRA, however, once a Tribe requests the State to negotiate, "the State *shall* negotiate with the Indian tribe in good faith." 25 U.S.C. 2710(d)(3)(A) (emphasis added). If the State does not do so, it can lose the opportunity to shape the scope of gaming activity that will ultimately be permitted under federal law. See 25 U.S.C. 2710(d)(7)(B)(iv) (authorizing court-appointed mediator to choose between proposals submitted by the Tribe and the State); 25 U.S.C. 2710(d)(7)(B)(vii) (authorizing the Secretary of

the Interior to prescribe gaming consistent with the compact selected by the mediator).

The court of appeals also regarded *Ex parte Young* as inapplicable because the tribal suits are, in its view, in reality against the State. 94-12 Pet. App. 24a. But the State is the real party in interest in all official capacity suits. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *Pennhurst*, 465 U.S. at 107-109 & n.17. Under *Ex parte Young*, the state officer's failure to abide by federal law strips the officer of whatever protection from suit the State might have. *Pennhurst*, 465 U.S. at 104. Accordingly, if a suit seeks prospective relief against a state official to vindicate federal law, it is permitted under *Ex parte Young* "notwithstanding the obvious impact on the State itself." *Pennhurst*, 465 U.S. at 104.

As the court of appeals noted, IGRA, by its terms, imposes substantive and remedial obligations on the State, and not on any particular state official. 94-12 Pet. App. 24a. A State, however, can negotiate only through its officials. The obligations that IGRA places on a State can therefore readily be understood to fall on those officials who have authority under state law to negotiate on behalf of the State. Cf. *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278, 286 (1913) ("The provisions of the [Fourteenth] Amendment * * * are addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power."). There is no apparent dispute in these cases that the governor is the official who has authority in both Florida and Alabama to negotiate on behalf of the State.

If the Court grants review on the question of Congress's power to abrogate the States' sovereign immunity in this setting, it should also grant review of

the question whether a suit may be brought against a governor under the doctrine of *Ex parte Young* to effectuate the compact-negotiation provisions of IGRA. The two questions involve the same statutory section, and a decision on the latter might render it unnecessary to consider the broader constitutional issues raised by the former.

3. Finally, the state petitioners present questions related to a statement in the court of appeals' opinion that if a State asserts its immunity from suit by a Tribe, the Secretary of the Interior would have authority to prescribe regulations for Indian gaming on the Indian lands of that Tribe. 94-12 Pet. App. 25a. The court's discussion of that issue, however, is dictum. Although the state petitioners assert that the court of appeals has created a remedy in favor of the Tribes (94-35 Pet. 10; 94-219 Cross-Pet. 9), the only relief ordered by the court of appeals was dismissal of the suits filed by the Tribes. 94-12 Pet. App. 25a. The court has not required the Secretary to prescribe regulations; it has not precluded the States from arguing to the Secretary that he has no authority to do so; and it has not precluded the States from later bringing a judicial challenge to any assertion of such authority by the Secretary. As Florida acknowledges (94-219 Cross-Pet. 11), what the state petitioners object to is nothing more than a "discussion" of an issue. Plenary review of that issue at this time is therefore unwarranted, even if the Court were to affirm the court of appeals' judgment dismissing these suits. Moreover, no court of appeals has expressed a contrary view on that issue—or even had occasion to do so—since the three other courts of appeals that have considered suits against States under IGRA have upheld Congress's power to authorize such suits.

We do not, however, urge the Court to deny the States' petitions outright at this stage. Plenary consideration of the sovereign immunity and *Ex parte Young* issues raised by the Tribes could conceivably lead the Court to take a different view of the proper disposition of the States' petitions when the Court renders its decision on the merits, and there is no reason for the Court to foreclose its ability to do so.

CONCLUSION

The petitions for a writ of certiorari in Nos. 94-12 and 94-189 should be granted. The petitions for a writ of certiorari in Nos. 94-35 and 94-219 should be held and disposed of as appropriate in light of the Court's decision in Nos. 94-12 and 94-189.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

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v.

STATE OF FLORIDA, ET AL.

STATE OF ALABAMA, ET AL., PETITIONERS

v.

POARCH CREEK INDIANS

POARCH BAND OF CREEK INDIANS, CROSS-PETITIONER

v.

STATE OF ALABAMA, ET AL.

STATE OF FLORIDA, ET AL., CROSS-PETITIONERS

v.

SEMINOLE TRIBE OF FLORIDA

ON PETITIONS AND CROSS-PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

The Solicitor General, on behalf of the United States as amicus curiae, respectfully files this supplemental brief to address a threshold procedural issue that was not taken into account in our initial submission and that now leads us to suggest a different disposition of the cross-petition for a writ of certiorari filed by the Poarch Band of Creek Indians in No. 94-189.

1. These cases arise under the provision of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, that provides for a suit to be brought in federal district court arising from a State's failure to negotiate in good faith with an Indian Tribe concerning a compact to govern Class III gaming activities on the Indian country of that Tribe. See 25 U.S.C. 2710(d)(7). The Eleventh Circuit held that Congress does not have authority under the Indian Commerce Clause of the Constitution to authorize a suit by an Indian Tribe against a State, and that a Tribe cannot bring an action under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), against the Governor of the State arising from the State's failure to negotiate concerning a compact. 94-12 Pet. App. 12a-24a. The Eleventh Circuit therefore ordered dismissal of the suits brought by the Seminole Tribe of Florida and the Poarch Band of Creek Indians against the State and Governor of Florida and the State and Governor of Alabama, respectively. 94-12 Pet. App. 25a. The Seminole Tribe (in its petition in No. 94-12) and the Poarch Band (in its cross-petition in No. 94-189) seek review of those holdings.

The court of appeals also expressed the view that, in the event a State raises an Eleventh Amendment defense to such a suit, the Tribe may notify the Secretary of the Interior of the State's failure to negotiate a compact, and at that point the Secretary of the Interior would have authority to promulgate regulations governing Class III

gaming on the Tribe's land. 94-12 Pet. App. 25a. The State of Florida (in its cross-petition in No. 94-219) and the State of Alabama (in its petition in No. 94-35) seek review of that portion of the court of appeals' opinion.

2. In the brief filed on December 28, 1994, we suggested that the Court grant the Tribes' petitions because the Eleventh Circuit has essentially held an Act of Congress unconstitutional, because there is a circuit conflict on the constitutional question, and because the *Ex parte Young* issue that is also raised by the Tribes is related to the issue of whether the Tribes can sue the States themselves. U.S. Br. 9-17. We further suggested, however, that the Court not grant (but instead hold) the States' petitions, because the court of appeals' discussion concerning the authority of the Secretary of the Interior if a State raises an Eleventh Amendment defense is dictum, because there is no circuit conflict on that issue, and because review would be premature in the absence of any action by the Secretary to issue such regulations. U.S. Br. 17-18.

3. In suggesting that the Court hold Alabama's petition for a writ of certiorari but grant the Poarch Band's cross-petition, we did not take into account the fact that although Alabama's petition was filed within 90 days of April 6, 1994, the date on which the court of appeals denied rehearing (see 94-12 Pet. App. 86a), the Poarch Band's cross-petition was not filed until July 29, 1994, and therefore was not timely in its own right under 28 U.S.C. 2101(c) and Rules 13.1 and 13.4 of the Rules of this Court. The Poarch Band's cross-petition was filed less than 30 days after receipt of Alabama's petition, and it therefore is timely under Rule 12.3 of the Rules of this Court. However, Rule 13.5 provides that "a cross-petition which, except for Rule 12.3, would be untimely, will not be granted unless a timely petition for a writ of

certiorari of another party to the case is granted." Accordingly, under this Court's Rules, the Poarch Band's cross-petition cannot be granted unless the Court grants Alabama's petition.

For the reasons stated above and in our initial brief (at 16-17), we continue to believe that the issue raised in Alabama's petition does not warrant plenary review by this Court, and that Alabama's petition (along with Florida's cross-petition in No. 94-219 raising the same issue) should be held and disposed of as appropriate in light of the Court's disposition of the Eleventh Amendment and *Ex parte Young* issues. If the Court chooses to hold Alabama's petition, however, the Poarch Band's cross-petition cannot, under Rule 13.5, be granted. We therefore suggest that the Court hold the Poarch Band's cross-petition in No. 94-189 as well.

The Eleventh Amendment and *Ex parte Young* issues are presented in the Seminole Tribe's certiorari petition in No. 94-12, and the Court can reach and decide those issues in that case. There accordingly is no need to grant review in the *Poarch Band* case in order to resolve those issues. If the Court should later reverse the judgment of the court of appeals in *Seminole Tribe*, it might then choose to grant the pending petition filed by Alabama and cross-petition filed by the Poarch Band, vacate the judgment of the court of appeals in the *Poarch Band* case, and remand that case to the court of appeals for further consideration in light of this Court's ruling in the *Seminole Tribe* case. If, on the other hand, the Court should later sustain the Eleventh Amendment and *Ex parte Young* rulings of the court of appeals in the *Seminole Tribe* case, the Court could then either deny the petition in No. 94-35 and the cross-petitions in Nos. 94-189 and 94-219, or otherwise dispose of the petition and

cross-petitions as appropriate in light of its decision in *Seminole Tribe*.

CONCLUSION

The petition for a writ of certiorari in No. 94-12 should be granted. The petition for a writ of certiorari in No. 94-35 and the cross-petitions for writs of certiorari in Nos. 94-189 and 94-219 should be held and disposed of as appropriate in light of the Court's decision in No. 94-12.

Respectfully submitted.

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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

STATE OF FLORIDA, Lawton Chiles, Governor,

Cross-Petitioners,

v.

SEMINOLE TRIBE OF FLORIDA,

Cross-Respondents.

On Petition For Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, IDAHO, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, TEXAS AND WYOMING IN SUPPORT OF FLORIDA'S CROSS-PETITION FOR CERTIORARI AND FLORIDA'S RESPONSE TO THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Upon dismissal of a suit on Eleventh Amendment grounds, may an Indian tribe directly request the prescription of gambling procedures from the Secretary of Interior?

II. Does Eleventh Amendment immunity invalidate statutory provisions, allowing the courts to fashion new remedies not prescribed by statute?

III. Should this Court uphold the Eleventh Amendment sovereign immunity of States from suit in federal court by Indian Tribes under the Federal Indian Gaming Regulatory Act?

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INTEREST OF AMICI STATES

Amici States of the Union now face the prospect, as a result of Part V of the decision of the Court of Appeals,[1] that Indian tribes will bypass procedures established by the Congress for the negotiation and completion of tribal-state compacts for serious gambling on Indian lands in those states. While holding principally that the Eleventh Amendment bars suit by an Indian tribe in federal court against an unconsenting state, the Eleventh Circuit added – almost as an afterthought – that the tribe may notify the Secretary of Interior whenever such a suit is dismissed, and the secretary may prescribe gaming. This legal error converts the States' Eleventh Amendment sovereign immunity into a means to subvert the will of Congress and the sovereignty of the states. Moreover, this judicially-created remedy allows the tribes to request that the Secretary prescribe casino gambling, even in states where it is criminally prohibited, on Indian lands, again contrary to the will of Congress and the sovereign states and principles of federalism. Indeed, the tribes and the Secretary may use the *states'* judicial sovereign immunity as a sword to bypass the tribal-state compacting procedures envisioned by Congress and impose as a matter of federal regulation the gambling requested by tribes.

---

[1] Case below consolidated under *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016 (11th Cir. 1994), holding principally that Eleventh Amendment is a bar to suit by an Indian tribe in federal court against an unconsenting State (Part IV). The consolidated decision reversed the district court decision in *Seminole Tribe of Florida v. State of Florida*, 11th Cir. No. 92-4652, and affirmed *Poarch Band of Creek Indians v. Alabama*, 11th Cir. No. 92-6244. 11 F.3d at 1029. This identical amicus brief, less Argument III, was filed July 5, 1994, in support of Alabama in *Poarch Creek Indians*, No. 94-35.

Congress provided for such a secretarial remedy only upon the judicial finding of a lack of good faith by a state to negotiate for that gambling which the state must negotiate. However, experience shows that upon a state's good faith refusal to negotiate for that gambling which it criminally prohibits for all purposes, such as blackjack, slot machines or electronic games of chance, tribes have sued states in federal court claiming a lack of good faith, evoking an Eleventh Amendment defense. The legal error of the court leaves states in the untenable position of facing tribal demands for casino gaming that is criminally prohibited in those states, followed by suit in federal court when the states do not negotiate for the criminally-prohibited gaming. By purposefully evoking a defense of sovereign immunity, tribes may *ab initio* bypass altogether the requirement to negotiate a tribal-state compact, leaving states subject to unbridled federal power to impose a scheme that may be entirely contrary to the states' criminal law.

Amici states believe the Court of Appeals legally erred in this case by reading into a federal statute a remedy for tribes that does not exist and which properly could not have been fashioned in the absence of any Congressional direction. Amici states also have an acute interest in the proper determination of the question of the applicability of Eleventh Amendment sovereign immunity to suits brought by tribes under IGRA.

SUGGESTION FOR CONSOLIDATION

Amici States respectfully suggest that this Court consider consolidating this case with *Poarch Band of Creek Indians v. State of Alabama*, U.S. Supreme Court No. 94-35 (petition for certiorari). Both *Seminole* and *Poarch Creek Indians* come to this Court from a single decision of the U.S. Court of Appeals for the Eleventh Circuit, *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016 (11th Cir. 1994), in which the circuit court had consolidated the two cases below (*Poarch Creek Indians*, 11th Cir. No. 92-6244, consolidated with *Seminole*, 11th Cir. No. 92-4652, decided Jan. 18, 1994).

Both cases presented the Eleventh Circuit with the same issue, namely, whether the Congress has the power to abrogate the Eleventh Amendment sovereign immunity from suit in federal court by enacting the Indian Gaming Regulatory Act ("IGRA"), Pub.L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-21, 18 U.S.C. §§ 1166-68). The Eleventh Circuit upheld that sovereignty as applied equally to the two cases, in a single decision. In Section V of that decision, it also suggested a remedy for Indian tribes facing a jurisdictional bar. It is from that language that Alabama seeks certiorari in No. 94-35, and the exact same language from which Florida seeks review in its cross-petition for certiorari in this case. Additionally, the Seminole Tribe seeks certiorari on the main holding of the decision, also in this case. The cases below arose in a similar fashion for both Alabama and Florida, upon suits brought by Indian tribes in the federal court, with the respective federal courts resolving the Eleventh Amendment question with diametrically opposite results. The Eleventh Circuit recognized this fact

in consolidating the cases and deciding the question. In the interest of judicial economy, and given the importance to all the States of resolving the issues presented by both Alabama and Florida, amici respectfully suggest these two cases be consolidated by this Court.

SUMMARY OF ARGUMENT

States are subject to the provisions of the Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. § 2701, *et seq.*, and 18 U.S.C. § 1166, *et seq.*[2] As provided by IGRA, states must negotiate tribal-state compacts with Indian tribes for class III gambling activities (all significant gambling beyond bingo and non-banked card games), and face suits by tribes in federal court to enforce the negotiating process. The Court of Appeals' final statement in Part V of the opinion that the tribes may notify the Secretary of Interior (and that the Secretary may then act to prescribe procedures for class III gaming) whenever such a suit is dismissed for subject-matter jurisdiction on Eleventh Amendment grounds is not supported by the statute and arrogates to the Secretary powers not delegated to that official by the Congress.

The states welcome the Court of Appeals' principal holding that an unconsenting state may not be sued in federal court by an Indian tribe under IGRA, as it goes to the heart of the constitutional scheme balancing the powers of the states and the Federal Government. However, the Court's final statement concerning the tribe's

[2] Amici states Maine, Massachusetts, and Rhode Island contend they are not subject to IGRA, based on their respective Indian land claims settlement acts.

remedy and the Secretary powers is inconsistent with the congressional directive and adversely affects the states. As the case before the courts is to be dismissed for subject matter jurisdiction, the court below was not free to engage in an analysis of severability or to fashion a remedy not envisoned by the Congress. For that reason, amici states respectfully urge this Court to reverse the ruling in Part V of the opinion, and affirm the core holding that Congress does not have the power to abrogate States' sovereign immunity under the Indian Commerce Clause.

ARGUMENT

I.

UPON DISMISSAL OF A SUIT UNDER IGRA ON ELEVENTH AMENDMENT GROUNDS, AN INDIAN TRIBE IS NOT ENTITLED TO THE PRESCRIPTION OF GAMING PROCEDURES BY THE SECRETARY OF INTERIOR

The Court of Appeals, in Part V of the opinion, incorrectly states that where a state "pleads an Eleventh Amendment defense, the suit is dismissed, and the tribe, *pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary may then prescribe regulations governing class III gaming on the tribe's lands.*" *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1029 (11th Cir. 1994); italics added. This procedure, however, does not appear in 25 U.S.C. § 2710(d)(7)(B)(vii), as cited,[3] or anywhere else in IGRA.

[3] All cited sections refer to Title 25 of the United States Code.

At the beginning of Part V of the opinion, the Court of Appeals notes that the procedures in §§ 2710(d)(7)(A)(i) and (B)(i)-(vi) necessarily fail when an unconsenting state refuses to consent to suit. *Seminole*, at 1029. This logically follows the Court's holding that the Eleventh Amendment serves as a jurisdictional bar to suit against an unconsenting state. *Ibid*. However, following the adoption of a severability analysis, the Court of Appeals reasoned that the final clause of section 2710(d)(7)(B), clause (vii), provided below, is somehow unaffected by the jurisdictional bar. By its plain language, however, that clause like the clauses preceding it, is inextricably tied to the jurisdiction of the federal court. As is evident, it is tied to the very clauses preceding it, from which it derives its meaning. Clause (vii) provides:

> "If a State does not consent during *the 60-day period described in clause (vi)* to a *proposed compact submitted by a mediator under clause (v)*, the *mediator shall notify* the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures –
>
> "(I) which are *consistent with the proposed compact selected by the mediator under clause (iv)*, the provisions of this Act, and the relevant provisions of the laws of the State, and [] (II) under which class III gaming may be conducted on the Indian lands over which the Indian tribes has jurisdiction."

Italics added.

Clearly, IGRA, at § 2710(d)(7)(B)(vii), contemplates the continuation of the process initiated with the lawsuit

in §§ 2710(d)(7)(A)(i) and (B)(i)-(vi). It is the *court-appointed mediator*, not the tribe, who notifies the Secretary of Interior, and only upon the refusal of a state to consent to the compact proposed by the mediator in clause (v).

The Secretary, in turn, is empowered solely to respond to a mediator's notification and may prescribe only those class III gaming procedures *consistent with a proposed compact selected by a mediator*. 25 U.S.C. § 2710(d)(7)(B)(vii)(I). Congress did not provide that tribes would be authorized to notify the Secretary directly with a request for class III gaming. Nor did it provide the Secretary with powers to prescribe gaming procedures independent of a court-appointed mediator's selected compact. Congress envisioned these procedures as a *limitation* upon the Secretary of Interior, following multiple opportunities to resolve outstanding differences between a state and tribe once litigation has arisen. To provide a remedy independent of the statutory process would be like proceeding to sentencing once a criminal defendant asserts the protection of the Fifth Amendment. Congress attempted to provide a process which protected the significant interests of the parties. Indeed, Congress noted the entire § 2710(d)(7) was

> " . . . the result of the Committee balancing the interests and rights of tribes to engage in gaming against the interests of the States in regulating such gaming."

Senate Report 100-446, S. 555, 100th Cong., 2d. Sess., 14.

The Committee noted that the provision permitting the tribe to sue the state on the basis of a lack of good-faith negotiation was designed as the least offensive

option "to encourage States to deal fairly with tribes as sovereign governments," *ibid.*, but also noted that the state had legitimate governmental interests to protect, including an interest in regulating class III gaming. Congress made no provision for the Secretary to substitute his discretion for that of the state, particularly in deciding important and difficult issues of state gambling law. It instead limited the Secretary to actions consistent with the exercise of a mediator's discretion. Congress could have provided an alternate means for the tribe to request class III gaming from the Secretary and for the Secretary to respond to that request, but Congress did *not* provide any such mechanism. The Court of Appeals is not free to fashion remedies that Congress has specifically chosen not to extend. *Landgraf v. USI Film Products*, ___ U.S. ___, ___, n. 36, 62 U.S.L.W. 4255, 4267, n. 36 (April 26, 1994); see *Northwest Airlines, Inc. v. Transportation Workers*, 451 U.S. 77, 97 (1981).

Amici states now face the prospect that the Court of Appeals' statement, will be offered by Indian tribes to the Secretary of Interior as a by-pass mechanism to serious negotiations and a new judicially-created protocol for the Secretary to entertain requests for class III gaming. The difficulty arises whenever a state refuses to concede to tribal demands for casino-type class III gaming which violates state law, but which a tribe maintains is "part of the public policy of the state" under *Cabazon Band of Mission Indians v. California*, 480 U.S. 202 (1988). In California and Texas, federal district courts have opined that certain casino-type games are properly the subject of negotiations, notwithstanding the criminal prohibitions on this activity. See, e.g., *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498, 1503 (S.D. Cal.

1992). Where the state believes that it need not negotiate for such activity, it faces the prospect of a lawsuit by the tribe for failure to negotiate in good faith, with the possibility of an unwanted mediation and secretarial procedures consistent with an appointed mediator's decision. Under such conditions, the unequal burden is on the state, which must then concede to the tribal demands or face the possibility that an appointed mediator's discretion will be substituted for the discretion of the state. It is under these and similar circumstances that certain states have raised the Eleventh Amendment as a bar to the lawsuits. In other states there are constitutional or other internal impediments to the express waiver of state sovereign immunity.

In any case, states have no reason to expect that upon dismissal of a suit for lack of subject-matter jurisdiction the Secretary of Interior has the unfettered power to consider tribal requests for class III gaming, as this is simply not evident in the statute. Instead, the Secretary's powers rest on the jurisdiction of the federal court to order compact negotiations and appoint a mediator, who, in turn, must follow statutorily-prescribed procedures before the Secretary may act upon the appointed mediator's notification and compact selection. Congress specifically granted the Secretary limited *regulatory* discretion in § 2710(d)(7)(B)(vii), namely, to prescribe consistently with an appointed mediator's compact selection; in this subsection, the Secretary has no power to decide a matter involving *legislative* discretion, such as what class III gaming to permit or not permit. See *American Federation of Gov. Employees v. Pierce*, 697 F.2d 303, 306 (D.C. Cir. 1982). While broad delegations of power have been upheld, see *Mistretta v. United States*, 488 U.S. 361, 373-374 (1989), by

contrast here, IGRA grants a narrow *regulatory* discretion to the Secretary. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 415-430 (1935).

II.

ELEVENTH AMENDMENT IMMUNITY IS A JURISDICTIONAL BAR AND DOES NOT INVALIDATE STATUTORY PROVISIONS AS UNCONSTITUTIONAL

The court-fashioned secretarial remedy discussed above is apparently premised on the Court of Appeals' conclusion that the lawsuit and mediation provisions in §§ 2710(d)(7)(A)(i) and (B)(i)-(vi) were severable from IGRA. Amici states submit the severance analysis is legally incorrect. In concluding that the Eleventh Amendment serves as a jurisdictional bar in IGRA, the Court of Appeals has upheld the states' sovereign immunity as a defense to certain actions. The Court of Appeals did not, however, hold the lawsuit and mediation provisions in IGRA to be unconstitutional. In fact, in footnote 15, the Court below noted that a state may consent to suit, *"in which case these provisions remain in full force."* If the provisions remain in full force for states consenting to suit and are barred for lack of subject-matter jurisdiction for states not consenting to suit, the provisions are not unconstitutional; the Court of Appeals did not invalidate them. As the Court of Appeals decided, the provisions are subject to a *defense* of lack of jurisdiction in certain cases. Were the provisions invalid as contrary to the Constitution, they should be dropped altogether. *Buckley v. Valeo*, 424 U.S. 1, 108 (1976). Unconstitutional provisions must be severed from the statute. *Alaska Airlines, Inc. v. Brock*, 480

U.S. 685 (1987). However, the lawsuit provisions of IGRA cannot be unconstitutional and severable on the one hand and *"remain in full force"* here and there, as acknowledged by the Court of Appeals, *Seminole*, n. 15.

By upholding the constitutional validity of the Eleventh Amendment as a jurisdictional bar, the Court of Appeals determined that the case must be dismissed for lack of subject-matter jurisdiction. Thus, it cannot properly reach the question of severability or whether other remedies might work for the tribe under IGRA. Indeed, upon affirmance of the dismissal for lack of subject matter jurisdiction, there is no further "case or controversy," within the meaning of Article III, § 2, clause 1, of the Federal Constitution, before the Court of Appeals. The court cannot give decisions which are primarily advisory, nor can it exercise functions which are essentially legislative. *Federal Radio Com. v. General Electric Co.*, 281 U.S. 464, 469 (1930); *Flast v. Cohen*, 392 U.S. 83, 95 (1942).

As the bar of the Eleventh Amendment is jurisdictional, once the action is found to be barred, a severance analysis and further interpretation is inappropriate. See *Apache Tribe of Mescalero Reservation v. New Mexico*, CIV 92-076-JC, Slip Op. at 2 (DC N.M., Dec. 22, 1992).[4] Further, dismissal on Eleventh Amendment grounds bars the consideration of the merits of the underlying action.

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[4] " . . . it would be improper for this Court to address the severability issue raised by the Apache Tribe of the Mescalero Reservation [having] already found that the Eleventh Amendment precludes this action in federal court absent waiver by the State of its immunity in a federal forum." *Apache Tribe*, Slip Op. at 2.

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. ___, 113 S.Ct. 684, 121 L.Ed.2d 605, 613 (1993); *United States v. Sisson*, 399 U.S. 267, 270 (1970). Here, the Eleventh Circuit, upon affirming the *Poarch Band* dismissal on Eleventh Amendment grounds, continued with a severance analysis and substantive commentary, including the creation of a judicial remedy not expressed by the Congress. This analysis and the creation of a remedy not found in IGRA has far-reaching and destructive consequences to significant State governmental interests.

III.

THIS COURT SHOULD RESOLVE THE CONFLICTS IN THE COURTS OF APPEAL BY UPHOLDING ELEVENTH AMENDMENT SOVEREIGN IMMUNITY

Amici States also agree with Florida in its Response to the Petition for Certiorari that this Court should resolve the conflicts in the Courts of Appeal as to whether the Eleventh Amendment is a jurisdictional bar to suit by tribes against States in the federal court under IGRA. The Eighth Circuit Court of Appeals in *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273, 280-81 (1993), and, most recently, the Ninth Circuit in *Spokane Tribe of Indians v. State of Washington*, ___ F.3d ___, 1994 WL 316443 (1994), both relied upon the language of the District Court in *Seminole Tribe v. State of Florida*, 801 F.Supp. 655, 657-63 (S.D.Fla. 1992), that Congress had the power to abrogate state sovereign immunity in IGRA under the Indian Commerce Clause. That very language of the District Court was disapproved and reversed by the Eleventh Circuit in this case. The Eleventh Circuit

held that notwithstanding Congress' intent to abrogate states' sovereign immunity, Congress lacks the *power* to do so under the Indian Commerce Clause, noting that the unique abrogation power afforded Congress under the Interstate Commerce Clause in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), cannot be extended to the Indian Commerce Clause. This derives, the court noted, from the fundamentally different purposes underlying the two clauses. *Seminole Tribe of Florida v. State of Florida*, 11 F.3d at 1027.

Amici States agree with Florida that this Court should address the Eleventh Amendment issue, but like Florida, do not accede to the arguments of the petitioning Tribe. The Eleventh Circuit properly found the Interstate and Indian Commerce Clauses distinguishable, correctly limited the plurality holding in *Union Gas* to the Interstate Commerce Clause, and properly rejected the application of the exceptions set forth in *Ex parte Young*, 209 U.S. 123 (1908). If this Court were to review these cases, amici States will argue the correctness of the Eleventh Circuit holdings on the Eleventh Amendment core issues.

CONCLUSION

For the reasons stated herein, amici states respectfully urge this Court to review and affirm the core Eleventh Amendment holdings, but to reject Part V of the opinion below.

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Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

vs.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF FLORIDA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 1, 1994
CERTIORARI GRANTED JANUARY 23, 1995

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The following portions of the record below have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

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Docket No. 91-6756
United States District Court for the Southern District of Florida

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9/19/91	1	COMPLAINT filed: FILING FEE $120.00 RECEIPT # 198237 TEB A-7 (msf) [Entry date 09/25/91]
10/10/91	4	ANSWER and defenses to Complaint by State of Florida, Lawton Chiles (Attorney Jonathan A. Glogau), (ch) [Entry date 10/18/91]
12/16/91	14	MOTION by State of Florida, Lawton Chiles to dismiss for lack of subject matter jurisdiction (11) [Entry date 12/28/91]
1/7/92	22	MEMORANDUM of points and authorities by Seminole Tribe in opposition to [14-1] motion to dismiss for lack of subject matter jurisdiction (sl) [Entry date 01/14/92]

Relevant Docket Entries

1/30/92	29	ORDER [14-1] motion to dismiss for lack of subject matter jurisdiction under advisement. (See order for further details) (signed by Judge Stanley Marcus on 1/29/92) CCAP (ch) [Entry date 02/05/92]
3/10/92	34	ORDER granting [33-1] motion to extend time to file motion for leave to file brief amicus curiae. United States have until 3/11/92 to file motion. (signed by Judge Stanley Marcus on 3/9/92) CCAP (ch) [Entry date 3/12/92]
4/13/92	38	Transcript filed re: hearing Date: 1/13/92 Before Judge: Stanley Marcus Volume No.: 1 Number of pages: 57 (ch) [Entry date 04/17/92]
6/18/92	46	ORDER denying [14-1] motion to dismiss for lack of subject matter jurisdiction (signed by Judge Stanley Marcus on 6/18/92) CCAP (ch) [Entry date 06/24/92]

Relevant Docket Entries

7/9/92	47	NOTICE OF APPEAL by State of Florida, Lawton Chiles from the Order denying motion to dismiss which was entered on 06/24/92 (Copies to USCA and Attorney of record). Fee Status: not paid (INTERLOCUTORY) (tb) [Entry date 07/13/92] [Edit date 07/14/92]
9/25/92	63	JOINT PRETRIAL STIPULATION by Seminole Tribe, State of Florida, Lawton Chiles (ch) [Entry date 09/28/92]
10/9/92	66	MOTION by State of Florida, Horse Council for summary judgment (hr) [Entry date 10/13/92]
10/9/92	69	MOTION with memorandum in support by Seminole Tribe for summary judgment (hr) [Entry date 10/13/92]
10/20/92	—	Transmitted record on appeal to U.S. Court of Appeals: [47-1] appeal by Lawton Chiles, State of Florida consisting of 2 vols. of pleadings & 2 vols. transcripts (USCA#92-4652) (tb) [Entry date 10/26/92]

Relevant Docket Entries

10/21/92	—	Certificate of readiness transmitted to USCA Re: [47-1] appeal by Lawton Chiles, State of Florida (tb) [Entry date 10/22/92]
11/2/92	80	MEMORANDUM in RESPONSE by State of Florida, Lawton Chiles to [69-1] motion for summary judgment (ch) [Entry date 11/03/92]
11/2/92	81	MEMORANDUM by Seminole Tribe in opposition to [66-1] motion for summary judgment (ch) [Entry date 11/03/92]
11/18/92	88	REPLY by State of Florida and Lawton Chiles to response to [66-1] motion for summary judgment (vr) [Entry date 11/19/92]
11/20/92	89	REPLY by Seminole Tribe to response to [69-1] motion for summary judgment (mg) [Entry date 11/23/92]
12/8/92	92	MEMORANDUM by Seminole Tribe in support of [69-1] motion for summary judgment and motion to reopen discovery (hr) [Entry date 12/09/92]

Relevant Docket Entries

12/23/92	93	RESPONSE by [State of Florida, Lawton Chiles to] Seminole Tribe, State of Florida . . . Notice of additional authority and addition facts in support of summary judgment and Motion to re-open discovery to [92-1] support memorandum (dt) [Entry date 12/28/92]
3/19/93	102	MOTION by Seminole Tribe supplemental for summary judgment referring to: [69-1] motion for summary judgment (dt) [Entry date 03/25/93]
3/19/93	102	MEMORANDUM by Seminole Tribe in support of [102-1] supplemental motion supplemental for summary judgment (dt) [Entry date 03/25/93]
4/6/93	107	RESPONSE by State of Florida, Lawton Chiles to [102-1] supplemental motion supplemental for summary judgment (ch) [Entry date 04/09/93]

Relevant Docket Entries

4/12/93	108	REPLY by Seminole Tribe to response to [102-1] supplemental motion supplemental for summary judgment, additional examples of permitting Casino nights, and additional authorities (ch) [Entry date 04/13/93]
9/22/93	114	ORDER denying [102-1] supplemental motion supplemental for summary judgment, denying [69-1] motion for summary judgment, granting [66-1] motion for summary judgment; Defendant submit proposed order of final judgment within 15 days (signed by Judge Stanley Marcus on 9/22/93) CCAP -M (dt) [Entry date 10/01/93]
10/20/93	116	FINAL JUDGMENT for State of Florida, Lawton Chiles against Seminole Tribe. Plaintiff having failed to prove violation of requirements of IGRA, this case is dismissed and parties shall go hence without day except the court

Relevant Docket Entries

		reserves jurisdiction to award costs. (signed by Judge Stanley Marcus on 10/15/93) CCAP/M 10/25/93 (ch) [Entry date 10/25/93]
11/16/93	117	NOTICE OF APPEAL by Seminole Tribe from Final Judgment entered 10/25/93. Fee Status: PAID $105.00 Receipt #631031 (Copies to USCA and Counsel of record). (vp) [Entry date 11/17/93]
1/21/94	—	Certificate of readiness transmitted to USCA Re: [117-1] appeal by Seminole Tribe USCA NUMBER: 93-5256 (tb)
1/21/94	—	Transmitted record on appeal to U.S. (Miami) Court of Appeals: [117-1] appeal by Seminole Tribe consisting of 3 volumes of pleadings, 1 accordian folder. (tb)

Relevant Docket Entries

Docket No. 92-4652
United States Court of Appeals
for the Eleventh Circuit

EXPEDITED
DATE DOCKETED 7-17-92

APPELLANT – STATE OF FLORIDA

APPELLEE – SEMINOLE TRIBE OF FLORIDA

RELATED # 93-5256

CONS # 92-6244

SEMINOLE TRIBE OF FLORIDA,

Plaintiff-Appellee,

versus

STATE OF FLORIDA, LAWTON CHILES, Governor of the State of Florida,

Defendants-Appellants.

JURISDICTIONAL SCREENING

FILINGS/ACTIONS
8-3-92 Staff Atty. Jurisdiction
8-4-92 Probable Jurisdiction Noted

Relevant Docket Entries

RECORD & EXHIBITS

Filed			Due
11/2/92	ROA (#Vols. 4: P2 T2)	§ 6	10/29/92

BRIEFING INFORMATION

Filed			Due
11/16/92	Brief for Appellant D: 11/13	§ 6	11/13/92
11/25/92	Record Excerpts Aplt.		11/30/92
12/14/92	D: 12/11/92	§ 6	12/11/92
12/24/92	Reply Brief for Appellant d 12/23/92	§ 6	12/23/92

EXTENSIONS

8-27-92 Consol. with 92-6244

OTHER MOTIONS & ORDERS

2/8/94 Flg. motion for leave to file amicus brief in support of the petitions for rehearing and suggestions for rehearing en banc by the states of California, Connecticut, Kansas, Mississippi, Montana, Nebraska, Nevada, Oklahoma, South Dakota, Washington and Wyoming. wl (court-2/8/94)

Relevant Docket Entries

2/17/94 Flg. ORDER: The motion for leave to file an amicus brief in support of the petitions for rehearing and suggestions for rehearing en banc, filed by the states of California, Connecticut, Kansas, Mississippi, Montana, Nebraska, Nevada, Oklahoma, South Dakota, Washington and Wyoming, is GRANTED, GBT wl

4/13/94 Flg. appellee's motion to stay mandate pending petition for writ of certiorari wl (court-4/14/94)

CALENDAR INFORMATION

11/24/92 Argument Scheduled for 1/7/93 in ATLANTA #338

JUDGMENT AND MANDATE INFORMATION

1/18/94 Judgment Entered

4/28/94 Mandate Stayed to 7/5/94

REHEARING INFORMATION

2/7/94(j) Petition for Rehearing (State of Florida only)
Apt. X Ape __ Panel X En Banc __

2/17/94(j) Court Ordered Response By Amicus states

4/6/94 Order Denying Rehearing

Relevant Docket Entries

SUPREME COURT INFORMATION
No. 94-12 & 94-35
94-189 94-219

7/11/94 Notice of Flg. Cert. on 7/1/94 (Seminole)

7/13/94 Notice of Flg. Cert. on 7/1/94 (AL)

8/3/94 Not. of Flg. Cert. 7/29/94 (Poarch)

8/18/94 Not of Flg. Cert. 7/28/94-FL-Chiles

COMPLAINT FILED SEPTEMBER 19, 1991, WITH EXHIBITS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 91-6756 CIV — MARCUS

SEMINOLE TRIBE of FLORIDA

Plaintiff,

v.

STATE OF FLORIDA, LAWTON CHILES, Governor of the State of Florida,

Defendants.

COMPLAINT

INTRODUCTION

1. The matter in controversy arises under the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 25 U.S.C. §§ 2701 to 2721.

2. This action arises from the failure of the State of Florida to negotiate in good faith to conclude a tribal-state gaming compact as required by the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(3).

JURISDICTION

3. The plaintiff Seminole Tribe of Florida (hereinafter the "Tribe") invokes the jurisdiction of this court pursuant to Section

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11(d)(7)(A) of the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A). The jurisdiction of this court is also invoked pursuant to 28 U.S.C. §§ 1331 and 1362. Plaintiff also seeks declaratory relief pursuant to 28 U.S.C. § 2201.

PARTIES

4. The plaintiff Seminole Tribe of Florida is a federally recognized Indian tribe with a constitution, governing body, and by-laws, duly organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, 48 Stat. 984. Seminole Tribal headquarters are in Broward County, Florida. The Seminole Tribe of Florida occupies and is recognized as possessing powers of self-government over its tribal Indian lands. The Tribe conducts gaming operations under the Indian Gaming Regulatory Act on such lands, which were acquired in trust by the United States prior to October 17, 1988 as required by 25 U.S.C. § 2719 to qualify as the situs of tribally conducted gaming.

5. The defendant State of Florida, pursuant to the Indian Gaming Regulatory Act, is the entity which must negotiate in good faith with the Seminole Tribe to conclude a compact governing Class III gaming.

6. The defendant, Lawton Chiles, is Governor of the State of Florida and, by authority of that office, is responsible for negotiations with the plaintiff Tribe pursuant to the Indian Gaming Regulatory Act.

BASIS OF THE CLAM

7. The Indian Gaming Regulatory Act was enacted in 1988.

The Act's express purpose was to provide a federal statutory basis for operation of gaming by Indian tribes on Indian lands for the purpose of promoting economic development and strong tribal government The Indian Gaming Regulatory Act provides a comprehensive federal regulatory scheme to determine whether a specific type of gaming will be permissible on Indian lands. Class I games (social games or traditional forms of Indian gaming) are not subject to regulation. Class II games (Bingo and similar to bingo games as well as certain card games) are subject only to tribal regulation under the oversight of the National Indian Gaming Commission. Class III games (all other games) are permitted only if conducted "in a state that permits such gaming for any purpose by any person, organization, or entity," in conformance with a tribal-state compact. 25 U.S.C. §§ 2703, 2710(d).

8. The Indian Gaming Regulatory Act requires that, upon a tribe's request, a state must enter into good faith compact negotiations for the conduct of Class III gaming by the tribe. 25 U.S.C. § 2710(d)(3)(A).

9. The Indian Gaming Regulatory Act makes tribally proposed Class III gaming the mandatory subject of a compact negotiation between a tribe and that state if the state permits such gaming "for any purpose by any organization or entity." 25 U.S.C. § 2710(d)(1)(B).

10. The State of Florida has evolved a broad public policy favoring the conduct of Class III gaming in a variety of circumstances. The State, by statute, expressly authorizes play of the following games of chance which fall within the category of games designated by Indian Gaming Regulatory Act as Class III games: (1) parimutuel betting on horse racing; (2) parimutuel

betting on dog racing; (3) parimutuel betting on Jai Alai; (4) off track betting at parimutuel site, (5) poker and (6) a state-operated, state wide lottery, utilizing on-line computer gambling devices, which may be operated in an unlimited variety of forms selected by the State Lottery Department.

11. The State also knowingly permits charities to operate Class III games of chance including craps, blackjack, roulette, and raffles at charitable fund raising events, variously called "Casino Nights," "Monte Carlo Nights," "Las Vegas Nights" or other similar terms.

12. The State also permits the use of computers and other electronic gambling devices in the sale of lottery tickets and the selection of numbers played by the public in the lottery, in the operation of Jai Alai and in the playing of bingo at state authorized bingo halls.

13. On January 29, 1991, James E. Billie, Chairman of the Seminole Tribe, wrote to defendant Governor Lawton Chiles requesting commencement of negotiations between the Tribe and the State of Florida for entry into a tribal-state compact providing for the conduct by the Tribe of Class III gaming activities on Seminole tribal Indian lands pursuant to the Indian Gaming Regulatory Act, Pub.L. 100-497, 25 U.S.C. §§ 2701 to 2721. (Exhibit A)

14. In early February, 1991, Jim Shore, General Counsel to the Tribe, received a telephone call from J. Hardin Peterson, Jr., the Governor's General Counsel, saying that Governor Chiles had authorized him to represent the Governor's Office in negotiating a compact and inviting the Tribe to submit a proposed compact for review. This was confirmed by Mr. Peterson's letter

dated February 15, 1991. (Exhibit B) In both the telephone conversation and the letter, Mr. Peterson stressed that the compact negotiations could be concluded very simply and without difficulty.

15. On March 4, 1991, Mr. Shore, representing Chairman James Billie, submitted a specific form of proposed compact providing for tribal operation of poker, as well as any and all video, electronic and computer aided games which duplicate poker, bingo, pull-tabs, lotto, punchboards, tip jars, instant bingo or other games similar to bingo. In his accompanying letter, Mr. Shore indicated that the Tribe was making a "conservative" request in order to "make it possible for the compact to be favorably concluded in a short time." (Exhibit C)

16. The State did not respond to the Tribe's March 4 letter until nearly three months later when, by letter dated May 24, 1991, the Governor's representative, Mr. Peterson, rejected all but one of the Tribe's compact requests and advised the Tribe that the only game proposed by the Tribe which could be the subject of a compact under Florida law was the card game of poker. (Exhibit D)

17. On June 18, 1991, Chairman Billie wrote to Governor Lawton Chiles to express the Tribe's dissatisfaction with the content of the Peterson May 24 letter and to request the personal involvement of the Governor in the compact negotiations. That letter also responded to the State's position by submitting additional games for consideration in the negotiations that appeared to meet some of the objections raised in the May 24 Peterson letter. At the same time, the Tribe requested that negotiations be expanded to include casino gaming. (Exhibit E)

18. On June 25, 1991, the Tribe submitted a ten-page legal memorandum providing specific support for the compact provisions it had submitted to Mr. Peterson and Governor Chiles.

19. On July 25, 1991, Mr. Peterson wrote to Chairman Billie on behalf of Governor Chiles (Exhibit F) and explained his May 24 letter as follows:

> I regret that you were disappointed at the content of my letter of May 24, 1991, but it was simply my intent to advise the Seminole Tribe of my understanding of the requirements of the Indian Gaming Regulatory Act and to provide the Tribe with some views expressed to me by the Office of the Attorney General.

20. On August 22, 1991, representatives of the Seminole Tribe met with State representatives to discuss the Tribe's pending compact request. At this meeting, the State expressed willingness to negotiate concerning poker and other card games, raffles and parimutuel wagering on dog and horse racing and jai alai. Mr. Peterson, however, repeated his earlier written assertion that the State would not negotiate for any form of gaming that was not expressly allowed by Florida state law and announced that the State refused to negotiate compact provisions for any machine gaming (video, electronic or computer aided games) or for any form of casino gaming.

21. At a final meeting with Tribal representatives on September 17, 1991, representatives of the State of Florida again reasserted the State's position that machine gaming and casino gaming are not subject to the Indian Gaming Regulatory Act compact negotiation requirement.

22. The Indian Gaming Regulatory Act required the State and its Governor to respond in good faith to the Tribe's request to negotiate within 180 days. 25 U.S.C. § 2710(d)(7)(B)(i).

23. More than 180 days have expired since the Tribe's January 29, 1991 request that the State enter into negotiations for a tribal-state gaming compact.

24. The State and its Governor have failed to respond in good faith to the Tribe's request for compact negotiations and have not conducted those negotiations in good faith. Specifically, they have failed to give good faith consideration to the Tribe's request for inclusion of various forms of machine gaming and casino gaming in the compact negotiation. They have maintained that position even though the proposed tribal games are 1) consistent with the State's broad public policy favoring the conduct of Class III gaming in a variety of circumstances, and 2) are specifically comparable to specific forms of gaming that the State itself either expressly authorizes by law or allows to operate. Despite the Tribe's stated readiness to negotiate for the purpose of entering into a compact, the State and its Governor have refused to enter into any negotiation for inclusion of such gaming in a tribal-state compact. They have thus violated the Indian Gaming Regulatory Act requirement of good faith negotiation.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays this honorable court to:

1. Order the State, acting through the Governor, and the Tribe pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii) to conclude a tribal-state compact governing the conduct of gaming activities

on Seminole Indian lands within a sixty-day period from entry of the Order, and appoint a mediator to resolve any impasse in accordance with 25 U.S.C. § 2710(d)(7)(B)(iv).

2. Enter a declaratory judgment that the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 to 2721, by reason of the State of Florida's permission for the operation "for any purpose by any person, organization or entity" of games described in paragraphs 10-12 above, obligates the State of Florida to negotiate in good faith with the Tribe regarding the conduct of any or all Class III games of chance on the Seminole Indian lands, including use of machines in the operation of those games, and including casino gaming.

3. Award plaintiff the costs of this action.

4. Order such other and further relief as the court deems just.

Respectfully submitted,

s/ Bruce S. Rogow
Bruce S. Rogow, P.A.
2441 S.W. 28th Avenue
Fort Lauderdale, Florida 33312
(305) 524 2465
Florida Bar # 067999

s/ Jerry C. Straus
Jerry C. Straus
Hobbs, Straus, Dean & Wilder
1819 H Street, N.W., Suite 800
Washington, D. C. 20006
(202) 783-5100

Complaint

Attorneys for the Seminole Tribe
of Florida

Dated: September 17, 1991

Complaint

EXHIBIT A

SEMINOLE TRIBE
of Florida

[letterhead text not reproduced]

January 29, 1991

Honorable Lawton Chiles, Governor
The Capital
Tallahassee, FL 32399

Dear Governor Chiles:

The Seminole Tribe of Florida is desirous of exercising authority provided for in the Indian Gaming Regulatory Act (IGRA) which permits the conduct of certain games classified as Class III upon entry into a compact with the state. Accordingly, I hereby request, pursuant to 25 U.S.C. § 2710(d)(3)(A) of IGRA, that negotiations be entered into between the Seminole Tribe of Florida and the State of Florida for the adoption of a compact providing for the conduct of Class III games on Seminole tribal Indian lands. The Tribal Council has authorized me to represent the Tribe in these negotiations.

Please advise me of the name of your representative in these negotiations so that we might contact that official and arrange a time and place for an initial meeting.

Sho Naa Bisha,

s/ James E. Billie
James E. Billie
Chairman

EXHIBIT B

STATE OF FLORIDA
OFFICE of the GOVERNOR

THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

LAWTON CHILES
GOVERNOR

February 15, 1991

Jim Shore, Esq.
General Counsel
Seminole Tribe of Florida
6073 Stirling Road
Hollywood, Florida 33024

Dear Mr. Shore:

Governor Chiles has forwarded to me for attention the letter of Mr. James E. Billie regarding negotiations between the Seminole Tribe of Florida and the State of Florida, as provided in 25 U.S.C. § 2710(d)(3)(A) of IGRA.

Governor Chiles has authorized me to represent the Governor's Office in negotiations with the Seminole Tribe of Florida.

As we had discussed by telephone, I believe we can accomplish these negotiations very simply if you will submit to this office a proposed compact for our review. Providing the compact meets requirements of the federal statute and the laws of this state, we can approve the compact.

I look forward to working with you in this matter.

With kindest personal regards.

Sincerely,
s/ J. Hardin Peterson
J. Hardin Peterson
General Counsel

JHP/la

EXHIBIT C

SEMINOLE TRIBE OF FLORIDA

[letterhead text not reproduced]

March 4, 1991

J. Hardin Peterson, Esq.
General Counsel
State of Florida
Office of the Governor
The Capitol
Tallahassee, FL 32399

Dear Mr. Peterson:

Reference is made to our recent telephone conversations and your letter of February 15, 1991, in which you advised me that you have been authorized by Governor Chiles to represent the State of Florida in compact negotiations as provided in 25 U.S.C. § 2710. As I advised you, I have been designated by Chairman James Billie to represent the Seminole Tribe in these negotiations.

On behalf of the Tribe, I would like to thank you for the prompt response to our request and for your indication that the Governor expects to approve our submittal if it meets the requirements of the federal statute and applicable state law.

In response to this, we are hereby submitting a proposed Compact that has been signed by Chairman Billie and is ready for execution by Governor Chiles. In order to expedite the process, we have limited our request to authorization of poker in various

forms and for various forms of video, electronic and computer versions of poker, Bingo, pull tabs, lotto or other games authorized by IGRA or the proposed Compact.

We hope that the conservative nature of our request will make it possible for the Compact to be favorably concluded in a short time.

Sincerely

s/ Jim Shore
Jim Shore
General Counsel

A COMPACT
between
THE SEMINOLE TRIBE OF FLORIDA
and
THE STATE OF FLORIDA
PROVIDING FOR THE CONDUCT OF TRIBAL
CLASS III GAMING
on
TRIBAL LANDS OF THE SEMINOLE TRIBE OF FLORIDA

THIS COMPACT is made and agreed to by and between the THE SEMINOLE TRIBE OF FLORIDA, an Indian Tribe organized under the Laws of the United States of America as provided for by Section 16 of the Act of June 18, 1934, 48 Stat. 984, 6073 Stirling Road, Hollywood, Florida 33024 (hereinafter referred to as "Tribe"), acting through its Chairman, James E. Billie, and the STATE OF FLORIDA (hereinafter "State"), acting through its Governor, the Honorable Lawton Chiles.

RECITALS

WHEREAS, the Tribe is a federally-recognized Indian Tribe (organized under the provisions of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984) and its governing body, the Tribal Council (hereinafter "Council"), is authorized by the tribal constitution to enter into contracts including this agreement with the State; and

WHEREAS, the Tribe exercises governmental power over tribal lands located within the boundaries of the State which are defined by Section 4 (4) of IGRA (25 U.S.C. § 2703(4))as "Indian lands" and

WHEREAS, the State is a sovereign state of the United States with all rights and powers thereto pertaining; and

WHEREAS, the Congress of the United States has by the Indian Gaming Regulatory Act (25 U.S.C. § 2710 *et seq.*) (hereinafter "IGRA") authorized tribes and states to negotiate and enter into compacts for purposes of providing for the conduct of Class III gaming, as defined by IGRA by Indian Tribes on their lands where "a state permits such gaming for any purpose by any person, organization, or entity," and

WHEREAS, "Class III gaming" means the class of gaming permitted in Florida by its authorization of any game which, if conducted by the Tribe would not be Class I gaming or Class II gaming as defined in Sections 4(6) and 4(7) of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2703(6) and (7), and

WHEREAS, the State permits a broad range of games which would be Class III games if conducted by the Tribe, including the Florida Lottery, and other games as follows:

1) Pari-mutuel or other wagering on dog racing and horseracing, including simulcasting thereof;

2) Pari-mutuel wagering on jai alai or pelota, or games of skill;

3) Wagering on card games, including poker, pinochle, bridge, rummy, canasta, hearts, dominoes, or mah jongg;

4) Casino nights; and

WHEREAS, the above conduct and authorization of these forms

of Class III gaming have satisfied the precondition, imposed by the United States Congress by enacting the Indian Gaming Regulatory Act, for the operation of lawful Class III gaming by the Tribe on Tribal lands in the State; and

WHEREAS, the tribe by a January 29, 1991 letter of the Tribal Chairman to the Governor, pursuant to the provisions of 25 U.S.C. § 2710(d)(3)(A), initiated negotiations with the State for the purpose of entering into a compact governing the conduct of Class III gaming activities on the Seminole Indian lands; and

WHEREAS, the State has responded to the Tribe's request and has in good faith negotiated this compact.

NOW, THEREFORE, the Tribe and the State agree and covenant as follows:

SECTION 1. Objectives

The objectives of the Tribe and State in making the Compact are as follows:

(1) to exercise authority to establish Class III gaming on Tribal lands in Florida as provided by the Congress of the United States by the enactment of the Indian Gaming Regulatory Act, P. L. 100-497, 25 U.S.C. § 2701 et seq. (the Act), and

(2) to provide for the operation of Class III gaming in which the Tribe shall have the sole proprietary interest, and

(3) to establish the rules for the regulation of Class III gaming operated by the Tribe on Tribal lands, and

(4) to establish guidelines for the licensing by the Tribe of primary gaming management officials and key employees, and

(5) to establish rules and procedures for ensuring that Class III gaming is conducted fairly and honestly by both the operators and by the patrons of any Class III gaming enterprise on Tribal lands.

SECTION 2. Authorized Class III Gaming

The Tribe may conduct the following games on tribal lands located within boundaries of the State which are defined by Section 4 (4) of IGRA (25 U.S.C. § 2703(4)) as "Indian lands":

a. Any and all forms of poker, including banking games;

b. Any and all video, electronic and computer aided games which duplicate poker, bingo, pull-tabs, lotto, punchboards, tip jars, instant bingo or other games similar to bingo.

SECTION 3. Regulation of Class III Gaming

(1) The following regulatory requirements shall apply to the conduct of Class III gaming authorized by this Compact. The Tribe shall maintain, as part of its lawfully enacted ordinances, at all times in which it conducts any authorized Class III gaming, requirements at least as restrictive as those set forth herein.

a. The Tribe may not hire, or employ, in connection with Class II gaming, any person who:

Complaint

(i) is under the age of 18;

(ii) has, within the immediately preceding five years, been convicted of or entered a plea of guilty or no contest to: a felony, any gambling-related offense, fraud or misrepresentation in any state, unless that person has been pardoned.

b. All accounting records shall be kept on a double entry system of accounting, maintaining detailed, supporting, subsidiary records. The Seminole Tribe shall maintain the following records for not less than three (3) years:

(i) Revenues, expenses, assets, liabilities and equity for each location at which Class III gaming is conducted;

(ii) Daily cash transactions for each game at each location at which Class III gaming is conducted, including but not limited to transactions relating to each gaming table bank, game drop box and gaming room bank;

(iii) All markers, IOU's, returned checks, hold checks or other similar credit instruments;

(iv) Individual and statistical game records (except card games) to reflect statistical drop, and statistical win;

(v) For video or other. electronic or electromechanical machine games, analytic reports which, by each machine shows the total

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amount of cash wagered and the total amount of prizes won;

(vi) Contracts, correspondence and other transaction documents relating to all vendors and contractors for not less than three years

(vii) Records of all tribal enforcement activities;

(viii) Audits prepared by or on behalf of the Tribe; and

(xi) Personnel information on all Class III gaming employes or agents, including rotation sheets, hours worked, employee profiles and background checks;

c. No person under the age of 18 may participate in any Class III game.

d. The Tribe shall not conduct any Class III gaming outside Tribal lands.

e. The rules of each card game shall be posted and be clearly legible from each table and must designate:

(i) The maximum rake-off percentage, time buy-in or other fee charged.

(ii) The number or raises allowed.

(iii) The monetary limit of each raise.

(iv) The amount of ante.

(v) Other rules as may be necessary.

(2) The regulatory requirements set forth in this section of this Compact shall be administered and enforced as follows:

a. The Tribe shall have primary responsibility to administer and enforce the regulatory requirements.

b. A representative of the State designated in writing by the Governor shall have the right, upon reasonable notice, to inspect all premises on which Class III gaming is conducted and the right to inspect and copy all tribal records relating to Class III gaming.

c. The Tribe shall have the right to inspect and copy all State records concerning all Class III gaming conducted by the Tribe; provided that the State may withhold access to records created or maintained in conjunction with an ongoing criminal investigation and any prosecution resulting therefrom.

d. In the event the State believes that the Tribe is not administering and enforcing the regulatory requirements set forth herein, it may involve the procedures set forth in Section 5 of this Compact.

(3) When the Tribe enters into a management contract for the operation of any Class III gaming or component thereof, the State shall be advised of such contract.

SECTION 4. Amendments.

The terms and conditions of this Compact may be modified,

amended or otherwise altered by written agreement of the parties which is approved by the Secretary of the Interior.

SECTION 5. Dispute Resolution.

(1) In the event either party believes that the other party has failed to comply with any requirement of this Compact, it may invoke the following procedure:

a. The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific statutory, regulatory or compact provision alleged to have been violated and shall specify the factual basis for the alleged noncompliance. Representatives of the state and Tribe shall thereafter meet within thirty (30) days in an effort to resolve the dispute.

b. In the event an allegation by the State is not resolved to the satisfaction of the State within ninety (90) days after service of the notice set forth in Section 5(1)(a), the State may serve upon the office of the Tribal Chairman a notice to cease conduct of such gaming. Upon receipt of such notice, the Tribe may elect to stop the gaming activity specified in the notice or invoke arbitration and continue gaming pending the results of arbitration. Any arbitration under this authority shall be conducted under the rules of the American Arbitration Association except that the arbitrators will be selected by the state picking one arbitrator, the tribe a second arbitrator and the two so chosen shall pick a third arbitrator. If the third arbitrator is not chosen in this manner within ten days after the second arbitrator is picked, the third arbitrator will be

chosen in accordance with the rules of the American Arbitration Association. In the event an allegation by the Tribe is not resolved to the satisfaction of the Tribe within ninety (90) days after service of the notice set forth in Section 5(1)(a) the Tribe may invoke arbitration as specified above.

(2) Nothing in Section 5(1) shall be construed to waive, limit, or restrict any remedy which is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact.

SECTION 6. Effective Date.

This Compact shall be effective as of March 1, 1991, upon:

(1) Endorsement by the Tribal Chairman of the Tribe after approval by the Council;

(2) Endorsement by the Governor of the State;

(3) Approval by the Secretary of the Interior of the United States, and

(4) Publication in the Federal Register.

SECTION 7. Duration

This Compact shall be in effect perpetually.

SECTION 8. Notices.

All notices required or authorized to be served shall be served by first class mail at the following addresses:

Tribal Chairman
Seminole Tribe of Florida
6073 Stirling Road
Hollywood, Florida 33024

Governor
The Capital
Tallahassee, FL 32399

IN WITNESS WHEREOF, the Seminole Tribe and the State of Florida have hereunto set their hands and seals.

Dated: _____ Dated: _____

SEMINOLE TRIBE OF FLORIDA STATE OF FLORIDA

BY: s/ James E. Billie
James E. Billie
Tribal Chairman

BY:
Lawton Chiles
Governor

APPROVAL BY THE SECRETARY OF THE INTERIOR

The foregoing compact between the Seminole Tribe of Florida and the State of Florida entered into on ____, is, pursuant to Section 11 the Indian Gaming Regulatory Act, 102 Stat. 2472, hereby approved this _____ day of _____, 1991 and it shall be promptly submitted to the Federal Register for publication.

_____

Secretary of the Interior

EXHIBIT D

STATE OF FLORIDA
OFFICE of the GOVERNOR
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

LAWTON CHILES
GOVERNOR

May 24, 1991

Jim Shore, Esq.
General Counsel
Seminole Tribe of Florida
6073 Stirling Road
Hollywood, Florida 33024

Dear Mr. Shore:

We are in receipt of your letter of March 4, 1991, which included a draft compact for the operation of certain class III gambling activities on the Seminole Reservation. This data [sic] [date] represents the point of commencement for negotiations with the Tribe under the Indian Gaming Regulatory Act (IGRA). Your request has been analyzed in light of our interpretation of controlling federal and Florida law and we respond as follows:

One of the requirements of the IGRA for the negotiation of a gaming compact is that the Indian gambling facility must be "located in a state that permits such gaming for any purpose, by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B).

Further, 18 U.S.C. § 1166 incorporates state gambling laws, which are made enforceable by the United States. Section 849.15, Florida Statutes, prohibits the possession, sale, lease, etc., of slot machines, defined in § 849.16, Florida Statutes, as:

> one that is adapted for use in such a way that, as a result of the insertion of any piece of money, coin or other object, such machine or device is caused to operate or may be operated and if the user, by reason of an element of chance or of any other outcome of such operation unpredictable by him, may
>
> (a) receive or become entitled to receive any piece of money, credit, allowance, or thing of value.

Based upon these statutory sections, we do not believe that there is a legal basic for the state to negotiate a compact covering the operation of any of the electronic games referred to in the proposed compact. It is consequently also our opinion that the current operation of electronic games on the Seminole Reservation are illegal under the IGRA and Florida law as slot machines. The Attorney General has so informed the United States Attorney for the Middle District of Florida of this view and requested action on this mater.

With regard to other games referenced in the proposed compact, we believe that § 2710(d) (l) (B) would prevent negotiation of a compact for the operation of banking card games. Although § 849.085, Florida Statutes, does permit the paying of poker, pinochle, bridge, rummy canasta, hearts, dominoes, or mah-jongg under certain limited conditions, no banking card games

are permitted. In addition, the prohibition on the possession of gambling devices found in § 849.231, Florida Statutes, would prevent the playing of banking card games traditionally using a blackjack table or a "shoe or box" for the dealing of cards.

Our conclusion is that the only game which Florida law allows and therefore which can be the subject of compact negotiations is poker. This letter is, therefore, the State's response, pursuant to 25 U.S.C. § 2710(d)(3)(A), to the Tribe's request for a negotiated compact for poker or any other game permitted by § 849.085, Florida Statutes.

Upon review of the proposed compact, the proposed State authority to inspect and regulate the permitted games and the environment in which they are played is insufficient. Because of the case-intensive nature of these games, the possibility of criminal infiltration of the operation requires a substantial State presence. We suggest inclusion of provisions for: State licensing of employees, including criminal background investigations; State law enforcement and criminal court jurisdiction; regulation and background checks for providers to the Tribe; unlimited free access for State regulators and/or law enforcement officer; and rules for bet limits and rakeoffs.

In addition to the aforementioned criminal enforcement concerns, the State would require provisions addressing the following issues: health and safety code applicability; regulation of alcoholic beverages; and tort remedies for patrons. All of the issues raised in this letter have been the subject of compacts we believe are appropriate for inclusion in this compact.

Please contact me when you have discussed this counterproposal with the appropriate authorities in the Tribe and are prepared to

meet to discuss these matters more specifically. Thank you for your cooperation in this endeavor.

With kindest personal regards,

Sincerely,

s/ J. Hardin Peterson
J. Hardin Peterson
General Counsel

JHP/la

EXHIBIT E

Revised Section 2. Seminole Gaming Compact
(June 18, 1991)

SECTION 2. Authorized Class III Gaming

The Tribe may conduct the following games on tribal lands located within the boundaries of the State which are defined by Section 4 (4) of IGRA (25 U.S.C. § 2703(4)) as "Indian lands":

a. Any and all forms of poker, including banking games;

b. Any and all video, electronic and computer aided games which duplicate poker, bingo, pull-tabs, lotto, punchboards, tip jars, instant bingo or other games similar to bingo.

c. Pari-mutuel or other wagering on dog racing and horse racing, involving simulcasting or off track betting thereon;

d. Pari-mutuel wagering on jai alai or pelota, or games of skill;

e. Wagering on card games, including pinochle, bridge, rummy, canasta, hearts, dominoes, or mah jongg;

f. Casino nights gaming which includes, but is not limited to, craps, roulette, baccarat, slot machines, chemin de fer, black jack, pai gow, and backgammon.

g. Raffles

EXHIBIT F

STATE OF FLORIDA
OFFICE OF THE GOVERNOR
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-0001

LAWTON CHILES
GOVERNOR

July 25, 1991

Mr. James E. Billie
Tribal Chairman
Seminol Tribe Florida
6073 Stirling Road
Hollywood, Florida 33024

Dear Mr. Billie:

Govenor Chiles has referred your letter of June 18, 1991, to me for review and further comment.

Your letter advised that a legal memorandum would be submitted detailing the Tribe's views as to the meaning of the relevant statutory provisions, Jack M. Skelding, Jr., Esq. submitted this memorandum to me on July 1, 1991, and we have arranged to meet on July 29, 1991, to set an agenda or our negotiations. I hope at that meeting we can determine what matters we need to pursue and what additional investigations need to be made to arrive at a compact acceptable to the Seminole Tribe and to the State.

I regret that you were disappointed at the content of my letter of May 24, 1991, but it was simply my intent to advise the Seminole

Tribe of my understanding of the requirements of the Indian Gaming Regulatory Act and to provide the Tribe with some views expressed to me by the Office of the Attorney General.

I look forward to working with you, Mr. Shore and Mr. Skelding in arriving at an acceptable compact.

With kindest personal regards,

Sincerely,
s/ J. Hardin Peterson
J. Hardin Peterson
General Counsel

JHP/la

cc: Jack M. Skelding, Jr., Esq.
Jim Shore, Esq.

ANSWER AND DEFENSES FILED OCTOBER 10, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT

Case No. 91-6756-CIV-MARCUS

SEMINOLE TRIBE of FLORIDA

Plaintiff,

v.

STATE OF FLORIDA, LAWTON CHILES, Governor of the State of Florida,

Defendants.

ANSWER AND DEFENSES

COMES NOW, DEFENDANTS STATE of FLORIDA and LAWTON CHILES, in his official capacity as GOVERNOR of the STATE of FLORIDA, by and through the undersigned attorney, and state the following answers and defenses to the Complaint:

1. Admitted.

2. Defendants deny that the State of Florida through its Governor has failed to negotiate in good faith concerning a tribal-state compact as required by the Indian Gaming Regulatory Act.

3. Admitted.

4. Defendants admit that the Tribe "is recognized as possessing powers of self-government over its tribal lands" only to the extent provided by Federal law. As to the rest of the paragraph: admitted.

5. Admitted to the extent that the State of Florida is the entity which must negotiate in good faith concerning such matters as are required pursuant to the Indian Gaming Regulatory Act.

6. Admitted to the extent that Lawton Chiles is Governor of the State; however, Defendants deny that the Governor is required by the Indian Gaming Regulatory Act to conduct negotiations on behalf of the State.

7. The statute speaks for itself.

8. The statute speaks for itself.

9. The statute speaks for itself.

10. Defendants deny the first sentence. Defendants admit that the following activities are expressly authorized by statute: parimutuel betting on horse racing, parimutuel betting on dog racing, parimutuel betting on Jai Alai, intertrack wagering at parimutel sites, penny-ante poker and a state -owned and -operated lottery. Defendants deny the remainder of Paragraph 10, particularly with reference to the allegation that the State authorizes "off track betting" and uses "computer gambling devices."

11. Denied.

12. Defendants admit that both computers and electronic devices are used in a wide variety of lawful commercial settings;

however, Defendants deny that the State permits the use of computerized or electronic gambling devices.

13. Admitted.

14. Admitted that Mr. Peterson stated in his 15 February 1991 letter that the compact negotiations could be conducted "very simply," but only if "the [Tribe's proposed] compact meets requirements of the federal statute and the laws of this state."

15. Admitted, except that the Tribe also requested "banking games," which are prohibited by Section 849.08 of the Florida Statutes.

16. Admitted.

17. Admitted.

18. Defendants admit that such a document was received.

19. Admitted.

20. As to the first sentence: admitted. Defendants admit that the State agreed to negotiate concerning those games identified in Section 849.085 of the Florida Statutes. Defendants admit that the State refused to negotiate concerning any machine gaming prohibited by Sections 849.15 and 849.16 of the Florida Statutes. Otherwise, denied.

21. Defendants admit that they refused to negotiate concerning any machine gaming prohibited by Sections 849.15 and 849.16 of the Florida Statutes.

22. Defendants admit that the Indian Gaming Regulatory Act requires the State to respond in good faith to the Tribe's request to negotiate within 180 days, but denies that the Governor is specifically required to respond thereto.

23. Admitted.

24. Denied.

FIRST DEFENSE

Defendants State of Florida and Lawton Chiles, in his capacity as Governor of the State of Florida, have negotiated in good faith concerning those gaming activities required by the Indian Gaming Regulatory Act and would show thereto as follows:

A. All of the Tribe's letters and calls were responded to by the Governor's designated representative and the Office of the Attorney General;

B. Representatives of the Governor's office, the Attorney General's office, and parimutuel wagering regulatory agencies met with the Tribe to work out the details of a compact; however, the Tribe refused to specifically identify the games they wished to conduct and how they proposed to regulate them; and,

C. At the Tribe's request, the State seriously considered all of the legal memoranda submitted by the Tribe in support of its position; additionally, the State provided legal memoranda to the Tribe based on its independent in-depth research and analysis of the applicable Federal and State laws.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

s/ Jonathan A. Glogau
Jonathan A. Glogau
Florida Bar No. 371823
Assistant Attorney General
Special Projects Section
111-36 South Magnolia Drive
Tallahassee, Florida 32301
(904) 488-5899
Attorney for State of Florida

Answer and Defenses

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail on Bruce S. Rogow, Esquire, 2441 S.W. 28th Avenue, Ft. Lauderdale, Florida 33312, this 7th day of October, 1991.

s/ Jonathan A. Glogau
Jonathan A. Glogau
Florida Bar No. 371823
Assistant Attorney General
Special Projects Section
111-36 South Magnolia Drive
Tallahassee, Florida 32301
(904) 488-5899
Attorney for State of Florida

Courtesy Copies Provided To:

J. Hardin Peterson, Esquire
Office of the Governor
The Capitol
Tallahassee, FL 32399-0001

Jerry C. Straus
Hobbs, Straus, Dean and Wilder
1819 H Street, N.W., Suite 800
Washington, D.C. 20006

DEFENDANTS' MOTION TO DISMISS ON ELEVENTH AMENDMENT GROUNDS FILED DECEMBER 16, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 91-6756-CIV-MARCUS
Magistrate Bandstra

SEMINOLE TRIBE OF FLORIDA

Plaintiff,

vs.

STATE OF FLORIDA, LAWTON CHILES, Governor of the State of Florida,

Defendants.

DEFENDANTS' MOTION TO DISMISS
ON ELEVENTH AMENDMENT GROUNDS

Defendants, State of Florida and Lawton Chiles as Governor of the State of Florida, pursuant to rule 12(b)(1), F.R.C.P., hereby move this court to dismiss this action for lack of subject matter jurisdiction and state:

1. This is an action brought by an Indian Tribe against the State of Florida and its Governor pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq*.

2. The asserted bases for subject matter jurisdiction of this court are 25 U.S.C. § 2710(d)(7)(A) and 28 U.S.C. §§ 1331, 1362, and 2201.

3. The Eleventh Amendment to the United States Constitution bars actions against the states in federal courts with some narrow exceptions, none of which are applicable to the instant action.

4. Because this action against Governor Chiles is in reality an action against the State, it is also barred by the Eleventh Amendment.

5. Defendants rely on the Memorandum of Points and Authorities filed contemporaneously herewith for support of this motion.

WHEREFORE, Defendants respectfully request this court to issue an order dismissing this case both against the State of Florida and its Governor.

Respectfully submitted this 13th day of December, 1991.

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

s/ Jonathan A. Glogau
Jonathan A. Glogau
Assistant Attorney General
Fla. Bar No. 371823
111-36 S. Magnolia Dr.
Tallahassee, Fl 32301
(904) 488-5899

COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by United States Mail on Bruce S. Rogow, 2441 S.W. 28th Avenue, Ft. Lauderdale, Florida 33312 and Andrew T. Lavin, P.O. Box 1040, Hollywood, Florida 33022, this 13th day of December, 1991.

s/ Jonathan A. Glogau
attorney

Courtesy copies to:

J. Hardin Peterson
Office of the Governor
The Capitol
Tallahassee, Florida 32399-0001

Jerry C. Strauss
Hobbs, Strauss, Dean & Wilder
1819 H Street N.W., Suite 800
Washington D.C. 20006

Supreme Court, U.S.
FILED
MAR 31 1995
OFFICE OF THE CLERK

No. 94-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

vs.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF FLORIDA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR PETITIONER

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Attorneys for Petitioner

Of Counsel:

EUGENE GRESSMAN
JOHN J. GIBBONS

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QUESTIONS PRESENTED

I. Does the Eleventh Amendment prevent Congress from authorizing suits by Indian tribes against states for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution?

II. Does the *Ex parte Young* doctrine permit suits against a state governor for prospective injunctive relief to enforce legislation enacted pursuant to the Indian Commerce Clause, Article I, Section 8, Clause 3 of the Constitution?

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No. 94-12

In The

Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

vs.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF FLORIDA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 11 F.3d 1016. Pet. App. 1a-25a. The order of the United States District Court for the Southern District of Florida is reported at 801 F. Supp. 655. Pet. App. 26a-42a. The district court's subsequent order on cross-motions

for summary judgment (unpublished) is on appeal to the Court of Appeals for the Eleventh Circuit, No. 93-5256, but that appeal has been stayed pending disposition of the proceedings in this Court. Pet. App. 43a-84a.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on January 18, 1994. Pet. App. 1a. Respondents' motion for rehearing was denied April 6, 1994. Pet. App. 86a. The petition for a writ of certiorari was timely filed on July 1, 1994, and certiorari was granted on January 23, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 3 (The Commerce Clause):

> The Congress shall have Power. . .To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

U. S. Const. amend. XI:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Statutes

Section 2710 of the Indian Gaming Regulatory Act is reprinted in its entirety in the appendix to the petition for writ of certiorari. Pet. App. 87a-100a. The relevant provisions of the Act, codified at 25 U.S.C. §§ 2701-2721, provide:

25 U.S.C. § 2710(d)(3):

> (A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.
>
> * * *

25 U.S.C. § 2710(d)(7):

> (A) The United States district courts shall have jurisdiction over --
>
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith. . . .
>
> * * *

> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

STATEMENT OF THE CASE

A. The Indian Gaming Regulatory Act

Petitioner Seminole Tribe of Florida is a federally recognized Indian tribe, duly organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, 48 Stat. 984. The Tribe occupies and possesses broad powers of self-government over its Indian tribal lands, comprising five separate reservations in the State of Florida. In the area of gaming, however, this power of self-government is subject to the provisions of the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166- 1168).

The decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), holding that a state could not enforce its "civil/regulatory" gaming laws on Indian lands, prompted Congress to enact IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). Congress, recognizing the need to "provide clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3), divided gaming into three separate classes and provided a different scheme of regulation for each.

Class I gaming, consisting of social or traditional games engaged in by individuals in connection with tribal ceremonies or

celebrations, 25 U.S.C. § 2703(6), was left to the exclusive regulatory control of the tribes. 25 U.S.C. § 2710(a)(1). Class II gaming, consisting of bingo games, games similar to bingo, and certain non-banking card games, 25 U.S.C. § 2703(7), was also left to the regulatory authority of the tribes, subject to the supervision of the newly-created National Indian Gaming Commission. 25 U.S.C. § 2710(a)(2). Class III gaming, defined as all gaming that does not fall within the class I and II definitions, 25 U.S.C. § 2703(8), and including various kinds of casino gaming such as banking card games and slot machines, was made subject to tribal and state joint regulation through the complex statutory scheme which is the genesis of this case.

Class III gaming on Indian lands is lawful only if authorized by a tribe located in a state which "permits such gaming," and when "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . ." § 2710 (d)(1); Pet. App. 93a. Congress provided various remedies to the tribes in the event a state refuses either to enter into compact negotiations or to negotiate in good faith. First, IGRA provides that if a state fails to negotiate in good faith a federal court may order the state to conclude a compact within sixty days. § 2710(d)(7)(iii); Pet. App. 98a. The jurisdictional statute provides:

> (A) The United States district courts shall have jurisdiction over—
>
> (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith. . . .

* * *

> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

§ 2710(d)(7)(A)(i) & (B)(i); Pet. App. 97a.

IGRA recognizes that agreement on a compact may not be reached even after an order to conclude a compact is entered by the court. The Act provides that, in the event the parties do not execute a compact within the sixty-day period provided by court order, they shall then each submit to a court-appointed mediator a proposed compact which represents that party's last best offer for a compact. 25 U.S.C. § 2710(d)(7)(B)(iv); Pet. App. 98a. The mediator shall select the proposed compact which best comports with IGRA, other applicable federal law, and the findings of the court, and shall submit that compact to the state and the tribe. 25 U.S.C. § 2710(d)(7)(B)(iv) & (v); Pet. App. 98a. If the state consents to the mediator's proposed compact within sixty days, it becomes the applicable tribal-state compact as if entered into by the parties. 25 U.S.C. § 2710(d)(7)(B)(vi); Pet. App. 98a. If not, the mediator shall notify the Secretary of the Interior, who shall prescribe, in consultation with the tribe and consistent with the proposed compact selected by the mediator and applicable law, procedures under which class III gaming may be conducted. § 2710 (d)(7)(B)(vii); Pet. App. 98a.

B. The Seminole Tribe Compact Request

In January 1991, the Seminole Tribe wrote to Florida Governor Lawton Chiles requesting the commencement of negotiations, pursuant to IGRA, for a tribal-state compact governing the conduct of class III gaming activities on tribal

lands. Pet. App. 44a; J.A. 21a. On March 4, 1991, the Tribe submitted a proposed compact providing for tribal operation of poker, and all video, electronic and computer-aided games which duplicate poker, bingo, pull-tabs, lotto, punchboards, tip jars, instant bingo and other games similar to bingo. J.A. 26a-35a. Although the Tribe contended casino-type games were permitted in Florida, it excluded them from its initial proposal. In a letter accompanying the proposal, the Tribe stated that it was making a conservative request to expedite the compacting process. J.A. 24a-25a. On May 24, 1991, the Governor's General Counsel responded for the Governor, rejecting all of the Tribe's proposed games with the exception of poker. Pet. App. 45a; J.A. 36a-39a.

The Tribe then wrote to Governor Chiles to express its dissatisfaction and to request the Governor's personal involvement in the compact negotiations. J.A. 16a; Complaint ¶ 17. J.A. 40a. Soon thereafter, the Tribe also submitted a legal memorandum to the State, providing specific support for the proposed compact provisions. Pet. App. 45a.

In August 1991, the Governor's General Counsel reasserted that the State would not negotiate regarding any form of gaming not expressly allowed by State statutes, nor would the State negotiate regarding any machine gaming or any form of casino gaming. J.A. 17a; Complaint ¶ 20. The State expressed a willingness to negotiate only poker and other card games, raffles, parimutuel wagering on dog and horse racing, and jai alai. *Id.* Tribal and State representatives met in September 1991, but the State refused to change its position regarding the scope of the negotiations. Pet. App. 45a-46a.

Invoking the remedy authorized by 25 U.S.C. § 2710(d)(7)(A)(i) & (B)(i), Pet. App. 97a, the Tribe filed suit against the State of Florida and its Governor on September 19, 1991. J.A. 12a-42a. The Tribe alleged that the State and the Governor had

"failed to respond in good faith to the Tribe's request for compact negotiations and had not conducted those negotiations in good faith." (Complaint at ¶ 24; J.A. 18a). The Tribe sought (1) an order that the State and the Tribe conclude a compact within sixty days, and if no compact had been concluded at the end of that time, that the court appoint a mediator; and (2) a declaratory judgment that IGRA requires the State to negotiate with the Tribe concerning all class III games, including casino gaming. J.A. 18a-19a.

After filing an answer (J.A. 43a-48a), the State and the Governor moved to dismiss the suit on Eleventh Amendment sovereign immunity grounds. J.A. 49a-51a. The district court denied their motion:

> Given Congress' plenary authority over Indian relations, explicitly noted in the text of the Constitution at Article I, §8, cl. 3, and the uniquely federal issues raised when such authority is exercised, considered in conjunction with the principles enunciated by the Supreme Court in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed.2d 1 (1989), we conclude that Congress, when acting pursuant to the Indian Commerce Clause, has the power to abrogate the States' immunity.

Seminole Tribe of Florida v. Florida, 801 F. Supp. 655, 658 (S.D. Fla. 1992); Pet. App. 26a, 32a. The State and the Governor sought interlocutory review in the Eleventh Circuit.[1]

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1. Jurisdiction in the court of appeals was based upon the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). See *Griesel v. Hamlin*, 963 F.2d 338 (11th Cir. 1992) (denial of Eleventh (Cont'd)

That court consolidated the *Seminole* case with the appeals from *Poarch Band of Creek Indians v. Alabama*. There, the Alabama district court had granted the State's and the Governor's Eleventh Amendment motions to dismiss. 776 F. Supp. 550 (S.D. Ala. 1991); 784 F. Supp. 1549 (S.D.Ala. 1992). The Eleventh Circuit reversed the *Seminole* decision and affirmed the *Poarch Creek* decisions, concluding that the Indian Commerce Clause does not provide Congress with the power to abrogate the States' Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1028 (11th Cir. 1994); Pet. App. 1a, 22a.

The Eleventh Circuit found that Congress clearly "manifested its intent to abrogate the states' immunity" under IGRA, *id.* at 1024; Pet. App. 14a, and that "Congress enacted IGRA solely under the Indian Commerce Clause," but that the Indian Commerce Clause does not permit Eleventh Amendment abrogation. The court rejected the relevance of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), questioning its viability and drawing a distinction between Congress' powers under the Interstate Commerce Clause (*Union Gas*) and the Indian Commerce Clause. 11 F.3d at 1026-28; Pet. App. 18a-22a.

(Cont'd)
Amendment immunity is an immediately appealable order); *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684 (1993) (collateral order doctrine permits immediate appellate review of orders denying claim of Eleventh Amendment immunity).

Simultaneously with the appeal on the immunity issues in the Eleventh Circuit, the parties filed cross-motions for summary judgment in the district court on the question of whether the State of Florida had fulfilled its obligation under IGRA to conduct compact negotiations in good faith. Pet. App. 43a. On September 22, 1993, the court granted the State's motion and denied the Tribe's, ruling that the State had negotiated in good faith. Pet. App. 43a, 83a. Review of the final judgment of the district court is pending in the Court of Appeals for the Eleventh Circuit (No. 93-5256), but has been stayed pending disposition of the Eleventh Amendment issue presented here. Pet. App. 84a.

The court of appeals noted that its conclusion regarding Congress' power to abrogate the Eleventh Amendment conflicted with the Eighth Circuit decision in *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993) (11 F.3d at 1023, n.5; Pet. App. 12a, n.5), and noted the conflict among district courts on the same issues. *Id.* at 1024, nn. 6 & 7; Pet. App. 13a, nn. 6 & 7.

The Eleventh Circuit also refused to apply the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to sustain the Tribe's suit against the Governor. First, the court viewed negotiation of a compact as discretionary, since IGRA leaves the terms of a compact to the discretion of the parties and provides an alternative procedure should the state refuse to negotiate at all. 11 F.3d at 1028; Pet. App. at 23a. Second, the court viewed the suit as one which was "in reality against the state itself," since IGRA authorizes suits against the state to compel the state to conclude a compact. *Id.* at 1029; Pet. App. at 24a.

After rejecting all bases for federal jurisdiction under IGRA's aegis, the court of appeals applied severance principles and carved out a remedy "for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit." 11 F.3d at 1029; Pet. App. 25a. The court concluded that the Tribe's remedy was to notify the Secretary of the Interior of the State's failure to negotiate and objection to jurisdiction, and "[t]he Secretary then may prescribe regulations governing class III gaming on the tribe's lands." *Id.* That remedy prompted Florida's motion for rehearing, despite the State's Eleventh Amendment success. Rehearing was denied. Pet. App. 86a.

The Seminole Tribe filed a petition for a writ of certiorari seeking review of the court of appeals' decision that the Eleventh Amendment barred the Tribe's suit. In a cross-petition, Florida and its Governor sought review of that portion of the decision giving the Secretary of the Interior power to prescribe

regulations. (No. 94-219, *pending*). The Court granted the Seminole Tribe's petition with respect to both questions presented — Congress' power to abrogate the Eleventh Amendment under the Indian Commerce Clause, and the availability of prospective injunctive relief under *Ex parte Young*.

SUMMARY OF ARGUMENT

1. The Indian Commerce Clause, art. I, § 8, cl. 3, U.S. Const., gives Congress "plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989). The Indian Commerce Clause was the product of colonial history and ambiguous language in the Articles of Confederation which failed to resolve the relationship between the emerging national government, the states, and the Indian tribes. The power ultimately contained in Article I, Section 8, Clause 3 made "Indian relations . . . the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

The Indian Commerce Clause provides Congress with the plenary power to abrogate states' Eleventh Amendment immunity. That abrogation in the Indian Gaming Regulatory Act, allowing tribes to sue states for prospective injunctive relief to compel compliance with the Act's good faith negotiation requirement, is consistent with the Constitution and with *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). The plurality opinion in *Union Gas*, acknowledging Congress' power to abrogate under the Interstate Commerce Clause to allow private suits for monetary damages, supports Congress' authorization of injunctive relief for tribes that seek the benefits and guarantees created by the Indian Gaming Regulatory Act.

2. Under the doctrine of *Ex parte Young*, 209 U.S. 123

(1908), the Court may order the Governor to comply with IGRA if IGRA did not successfully abrogate the State's Eleventh Amendment immunity. *Ex parte Young* allows federal courts to order state officials to comply with federal law. "[T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) (*quoting Ex parte Young*, 209 U.S. at 160). The Tribe's demand under 25 U.S.C. §2710(d)(7)(B)(iii) (Pet. App. 98a), that the Governor be ordered to enter into a compact with the Tribe within sixty days, is a claim for prospective injunctive relief to compel a state official to comply with federal law, and is thus within *Ex parte Young*.

The court of appeals erred in holding that *Ex parte Young* does not apply because IGRA imposes discretionary duties on the State. 11 F.3d at 1028-29; Pet. App. 23a-24a. The discretion allowed the State and its officers, in defining the terms of a proposed compact, is limited by the requirement that they "negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A); Pet. App. 95a; *supra* at p. 3. *Ex parte Young* and later cases distinguish between an official's discretion and limitations on that discretion, and allow suits to enforce limitations on discretion. *See Ex parte Young*, 209 U.S. at 159 ("An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer.").

The court of appeals reasoned incorrectly that this suit seeking prospective injunctive relief against the Governor is in reality one against the State because IGRA refers only to the state and not to its officers. 11 F.3d at 1029; Pet. App. 24a. A state can act only through its officers; all *Ex parte Young* actions require state officials, in their official capacities, to comply with federal

law applicable to the "States," notwithstanding the "obvious impact on the State itself." *Pennhurst*, 465 U.S. at 105. *Ex parte Young* did not require that the official who is sued be named in the statute as the person whose duty it is to enforce the statute. The only requirement is that "the state officer by virtue of his office has some connection with the enforcement of the act," regardless of the source of that connection. 209 U.S. at 157. That criterion is satisfied here, since it is undisputed that the Governor entered into compact negotiations with the Tribe and had the authority to do so.

3. *Hans v. Louisiana*, 134 U.S. 1 (1890), should be revisited, at least as to congressionally authorized tribal suits against states. *Hans*, which expanded the plain language of the Eleventh Amendment to encompass all suits brought against the states in federal courts, has been the subject of repeated criticism within the Court. *Welch v. Texas Dept. of Hwys. and Pub. Transp.*, 483 U.S. 468, 496 (1987) (Brennan, J., dissenting); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 788 (1991) (Blackmun, J., dissenting). Given the Article I, Section 8, Clause 3 Indian Commerce Clause purpose of limiting state sovereignty in Indian affairs, and the Article III grant of judicial power subject to Congress' authority to promote national peace and harmony, Congress' power to authorize tribal suits against states is necessary and unsurprising. Since the text of the Eleventh Amendment does not bar such suits, and since the states surrendered power to the federal government in Indian matters, *Hans v. Louisiana* should not be read to encompass congressionally authorized tribal actions against the states.

ARGUMENT

I.

CONGRESS HAS THE POWER TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY, PURSUANT TO THE INDIAN COMMERCE CLAUSE.

The suit by the Seminole Indian Tribe against the State of Florida and its Governor sought declaratory and prospective injunctive relief. The action and the relief requested were expressly authorized by the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(i) and (B)(i). The State maintains that the Eleventh Amendment prohibits the exercise of federal jurisdiction. Sustaining that position would destroy the delicate federal/tribal/ state balance sought by the Act.

The district court denied the State's motion to dismiss on Eleventh Amendment grounds. Pet. App. 26a. Reversing, the Court of Appeals for the Eleventh Circuit concluded that the Indian Commerce Clause does not provide a basis for Congress to abrogate the states' Eleventh Amendment immunity. In contrast, the Eighth, Ninth and Tenth Circuits have held that under the Indian Commerce Clause Congress does have the power to abrogate that immunity. *Cheyenne River Sioux Tribe v. State of South Dakota,* 3 F.3d 273 (8th Cir. 1993); *Spokane Tribe v. Washington,* 28 F.3d 991 (9th Cir. 1994), *petition for cert. filed* No. 94-357, 63 U.S.L.W. 3161, Aug. 29, 1994; *Ponca Tribe of Oklahoma v. State of Oklahoma,* 37 F.3d 1422 (10th Cir. 1994), *petition for cert. filed* Nos. 94-1029, 1030, 63 U.S.L.W. 3477, Dec. 9, 1994.

This Court has not decided whether Congress, under the Indian Commerce Clause, can abrogate Eleventh Amendment immunity. *Blatchford v. Native Village of Noatak,* 501 U.S.

775 (1991), held that 28 U.S.C. § 1362 – the Indian tribe jurisdictional statute – was not a congressional abrogation of Eleventh Amendment immunity because it lacked language indicating Congress' intent to do so. *Id.* at 788.[2] *Blatchford* did not address the question of whether Congress can abrogate Eleventh Amendment immunity pursuant to the Indian Commerce Clause. *Id. Blatchford's* finding that the Eleventh Amendment precludes an Indian tribe's federal court suit for monetary relief against a state left undecided the question of whether equitable relief is available against a state:

> Finally, respondents argue that even if the Eleventh Amendment bars their claim for damages, they still seek injunctive relief, which the Eleventh Amendment would not bar. The Court of Appeals, of course, did not address this point, and we leave it for that court's initial consideration on remand.

Id. at 788. Mootness obviated the inquiry on remand. *Native Village of Noatak v. Blatchford,* 38 F.3d 1505 (9th Cir. 1994) (appeal after remand).

The Seminole Tribe contends that the Indian Commerce Clause does provide a basis for abrogation; that Congress unequivocally intended to and did abrogate Eleventh Amendment immunity *via* 25 U.S.C. § 2710(d)(7)(A)(i); and that even if abrogation was not authorized, the Eleventh Amendment does not bar a suit against an officer of a state for declaratory and injunctive relief to compel compliance with federal law.

The Eleventh Amendment provides:

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2. That decision was also based upon a finding that there was no mutuality of waiver between states and tribes in the plan of convention, as there was among the states. 501 U.S. at 782.

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

As interpreted in a line of cases beginning with *Hans v. Louisiana,* 134 U.S. 1 (1890), absent abrogation, the Eleventh Amendment has been read to protect states from all suits in federal court unless the state has consented "either expressly or in the 'plan of convention.' " *Blatchford,* 501 U.S. at 779 (citations omitted).

Here, the State did not expressly consent to suit, and *Blatchford* precludes the Seminole Tribe from arguing state consent in "the plan of convention." *Id.* at 782. The Tribe invites the Court to revisit *Hans*, at least on a limited basis, an invitation not made by the Native Village governments in *Blatchford. Id.* at 779. That argument, made in Point III *infra* at p. 31, draws from the often articulated minority view that the Eleventh Amendment does not apply "outside the context of State/citizen and State/alien diversity suits." *See Blatchford,* 501 U.S. at 788 (Blackmun, J., dissenting, joined by Marshall and Stevens, JJ.). *Hans* therefore should not be read to create an Eleventh Amendment bar to an Indian tribe's suit seeking "to vindicate federal rights against a State." *Id.*

However, *Hans* need not be considered if the Indian Commerce Clause provides Congress with the power to abrogate States' immunity, or if *Ex parte Young,* 209 U.S. 123 (1908), permits the Seminole Tribe's suit against the Governor of Florida.

A. Article I Abrogation Power

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), recognized Congress' power to abrogate Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment. The *Pennsylvania v. Union Gas Co.,* 491 U.S. 1 (1989), plurality held that pursuant to the Interstate Commerce Clause, Congress has the power to abrogate Eleventh Amendment immunity in a suit against the State for monetary relief.

The Eleventh Circuit concluded that *Union Gas* cannot be applied to the Indian Commerce Clause because "the different purposes underlying the two clauses mandate they be treated distinctly." Pet. App. 21a. The court of appeals believed that the Interstate Commerce Clause's *raison d'etre* — limiting the states to maintain free trade among them — carries more power to abrogate than does the Indian Commerce Clause, despite the fact that the Indian Commerce Clause's "central function . . . is to provide Congress with *plenary* power to legislate in the field of Indian affairs." *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192 (1989) (emphasis supplied).[3]

There is no principled basis for finding that congressional power under the Indian Commerce Clause is less than that conferred by the Interstate Commerce Clause. *See Spokane Tribe v. Washington,* 28 F.3d at 997 (9th Cir. 1994). Indeed, Congress' plenary power over Indian affairs lends more, not less, credence to the argument that abrogation under the Indian Commerce Clause is within the power of Congress.

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3. The court of appeals rejected the Interstate Commerce Clause as an additional basis for enacting the Indian Gaming Regulatory Act. Pet. App. 16a-17a. The *amicus curiae* Briefs of the National Indian Gaming Association, *et al.*, and the Miccosukee Tribe of Florida, develop the Interstate Commerce Clause basis for IGRA's enactment. Under that argument, *Union Gas* requires reversal of the decision below.

Congress' ability to abrogate Eleventh Amendment immunity must be premised upon "a valid exercise of power." *Green v. Mansour,* 474 U.S. 64, 68 (1985). The source of the power must be an affirmative constitutional grant of power to Congress. *See Garcia v. San Antonio Metro. Transit Auth.,* 469 U.S. 528 (1985):

> The States unquestionably do "retai[n] a significant measure of sovereign authority" [but] . . . [t]hey do so, however, only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.

Id. at 549 (citation omitted).

The Article I, Section 8, Clause 3 plenary federal power to "regulate commerce . . . with the Indian tribes" is exclusive: "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 234 (1985). The constitutional provision was the product of dissatisfaction and discord caused by an ambiguity in Article IX (4) of the Articles of Confederation, which allowed some states to argue that their Indian trade powers were unencumbered by federal authority. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832).

> Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. I, sec. 8, cl. 3, that granted Congress the power to regulate trade with the Indians.

County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 n.4 (1985).

Ratification of the Constitution, and the cure effected by Article I, Section 8, Clause 3, solved a problem which had plagued colonial history.[4] All doubts were removed: Congress has exclusive plenary power to regulate commerce with Indian Tribes.

> These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the [articles of] confederation, are discarded.

Worcester v. Georgia, 31 U.S. at 559.

While the Indian Commerce Clause is antecedent to the Eleventh Amendment, abrogation power under that Clause is

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4. The Article IX (4) problem was its last proviso:

> The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any state within its own limits be not infringed or violated.

James Madison viewed this division of powers as "absolutely incomprehensible" and an "endeavor to accomplish impossibilities." The Federalist, No. 42, p. 284 (J. Cooke ed. 1961). He advocated the Indian Commerce Clause because under it, "[t]he regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory." *Id.*

consistent with constitutional history and compatible with case law. The *Union Gas* plurality held that the Interstate Commerce Clause provided the power to render states liable in private suits for money damages. Here, the Indian Commerce Clause provides an even stronger foundation for Congress' ability to subject states to suits by Indian tribes for prospective injunctive relief. That should be no surprise to the states:

> These Indian tribes . . . owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

United States v. Kagama, 118 U.S. 375, 383-84 (1886).

The abrogation power must be available under the Indian Commerce Clause, in order to protect the tribes from state action denying federally guaranteed rights. This is particularly true where the states' limited authority to act is entirely derived from the statute guaranteeing the tribal rights. The states are protected from undue congressional action by their representation in Congress. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. at 550-51:

> [T]he principal and basic limit on the federal commerce power is that inherent in all

> congressional action — the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.

Id. at 556. The states' representatives in Congress protect the states; the tribes have no representation in Congress, and rely upon the federal government to protect the tribes from the states. Congress' enactment of IGRA and its federal court injunctive remedy is consistent with the political balance of powers between the federal government, the states, and the tribes.[5]

B. The Eleventh Circuit's "Private Activity" Analysis Is Incorrect.

The decision below sought to limit the *Union Gas* abrogation power to situations where "the states partake in an activity typical of private individuals." Pet. App. 22a. Distinguishing *Parden v. Terminal Railway of Alabama*, 377 U.S. 184 (1964), the court of appeals posited Pennsylvania's hazardous waste site land use operations and Alabama's for-profit railroad operation to be like those of private citizens, and therefore subject to commerce power abrogation:

> We believe the Supreme Court's jurisprudence clearly evinces an intent to

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5. IGRA allows only injunctive relief. Congress' distinction between damages and injunctive relief weighs heavily in favor of Eleventh Amendment abrogation. *Hess v. Port Auth. Trans-Hudson Corp.*, 115 S. Ct. 394, 404 (1994): "[T]he impetus for the Eleventh Amendment [is] the prevention of federal court judgments that must be paid out of a State's treasury." Here, the states' representatives in Congress fashioned a remedy consistent with the core values of the Eleventh Amendment and the Indian Commerce Clause.

> allow federal jurisdiction over states only where the state's conduct is outside the typical realm of state authority.
>
> * * *
>
> Thus, even if *Union Gas*' reasoning were to give Congress abrogation power under the Indian Commerce Clause *in general,* we would hold that Congress may not abrogate when it legislates in an area typically reserved to the states (such as negotiating regulations with Indian tribes).

Pet. App. 21a-22a (emphasis in original).

Neither the cases cited by the court below, nor the Constitution, which gives the federal government the paramount and plenary power to treat with tribes (art. I, § 10; art. II, § 2, cl. 2, U.S. Const.), supports the Eleventh Circuit's rationale. *Parden* and *Union Gas* do not ascribe any Eleventh Amendment significance to the functions performed by the states in those cases. And, neither precedent nor practice supports a notion that states' negotiations with tribes have ever been viewed as matters "typically reserved to the states." Indeed, the exclusivity of the federal power over Indian affairs leaves little doubt that "negotiating regulations with Indian tribes" is congressionally circumscribed, and is certainly not "reserved to the states." *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987).

No principled reason supports the Eleventh Circuit's attempt to distinguish *Union Gas* on a private/public activity theory. Either Congress has the power to abrogate, or it lacks that power. If the Eleventh Amendment is not subject to abrogation under the

Indian Commerce Clause, then the federal statutory rights which prompted the Seminole Tribe's suit for prospective injunctive relief are alternatively cognizable in federal court under the doctrine of *Ex parte Young*.

II.

UNDER *EX PARTE YOUNG,* A FEDERAL COURT MAY REQUIRE THE GOVERNOR TO NEGOTIATE IN GOOD FAITH PURSUANT TO THE INDIAN GAMING REGULATORY ACT.

A second and independent ground for reversing the judgment of the Eleventh Circuit stems from the fact that the Seminole Tribe sued not only the State of Florida but also the Governor of Florida. The relief sought against the Governor was a prospective injunction to compel him to obey a federal statutory duty to negotiate in good faith with the Seminole Tribe.[6] In this situation, *Ex parte Young,* 209 U.S. 123 (1908), makes plain that, whatever Eleventh Amendment immunity from suit the State of Florida might have, such immunity is not shared by the Governor, at least where only prospective relief is sought against him. *Edelman v. Jordan,* 415 U.S. 651 (1974).

The Eleventh Circuit held that the doctrine of *Ex parte Young* is inapplicable in this case for two reasons: (1) the doctrine cannot be used to compel a state official to perform discretionary acts, such as negotiating the terms of a contract, and (2) the

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6. The Governor of Florida, acting under his authority as chief executive officer of the state, entered into compact negotiations with the Seminole Tribe. In their answer to the complaint, defendants asserted that "Defendants State of Florida and Lawton Chiles, in his capacity as Governor of the State of Florida, have negotiated in good faith" with the Tribe concerning class III gaming. J.A. 46a. *See* Fla. Const., art. IV, § 1(a) (vesting "supreme executive power" in the governor).

doctrine does not apply if the suit in reality is a suit against the State itself. The Eleventh Circuit erred. IGRA mandates good faith negotiations, not contract terms. Stripped of their fiction, all *Ex parte Young* actions *are* suits against states. The court of appeals' view of duty, discretion and state action does not survive analysis.

A. *Ex parte Young*

The doctrine of *Ex parte Young*, 209 U.S. 123 (1908), allows prospective injunctive relief to compel the Governor's compliance with IGRA mandates. The doctrine is an "important exception" to the general Eleventh Amendment bar to suits nominally against state officers. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984). Such suits may proceed because:

> [r]ather than defining the nature of Eleventh Amendment immunity, *Young* and its progeny render the Amendment wholly inapplicable to a certain class of suits. Such suits are deemed to be against officials and not the States. . . .

Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 113 S. Ct. 684, 688-89 (1993).

Ex parte Young upheld a federal court injunction preventing the Minnesota Attorney General from enforcing an unconstitutional state statute. The Eleventh Amendment did not bar the suit because an unconstitutional state statute is "void" and cannot "impart to [the officer] any immunity from responsibility to the supreme authority of the United States." 209 U.S. at 159-60.

Ex parte Young's role in ensuring the supremacy of federal

law has been consistently reaffirmed by this Court. *See, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974); *Pennhurst*, 465 U.S. 89. As *Pennhurst* explained, "*Edelman* held that when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief." 465 U.S. at 102-03. *Pennhurst* specifically approved the "fiction" of allowing relief in official-capacity actions against state officials, notwithstanding the "obvious impact on the State itself," because "the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " *Id.* at 104-105 (quoting *Ex parte Young*, 209 U.S. at 160).[7]

The Seminole Tribe's suit, seeking injunctive relief to compel a state official to comply with federal law, 25 U.S.C. § 2710(d)(7)(B)(iii), falls squarely within the doctrine of *Ex parte Young*. It seeks only a prospective remedy to end a continuing violation of federal law – a remedy that does nothing more than vindicate the federal interest in assuring the supremacy of that law.

B. The Relief Requested Would Not Compel a Discretionary Act.

The court of appeals held that *Ex parte Young* does not apply because IGRA imposes "discretionary" duties on the State which cannot be compelled under that doctrine. Pet. App. 23a-24a. That rationale fails to recognize that IGRA requires the state and its

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7. *See Puerto Rico Aqueduct and Sewer Auth.*, 113 S.Ct. 684, 688: "The doctrine of *Ex parte Young*, which ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law, is regarded as carving out a necessary exception to Eleventh Amendment immunity." *See also Green v. Mansour*, 474 U.S. 64, 68 (1985).

officials to adhere to a statutory standard of "good faith." Violation of that non-discretionary statutory requirement can be cured under *Ex parte Young*.

IGRA provides that in negotiations for a compact governing class III gaming, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A); Pet. App. 95a.[8] IGRA also provides that if a tribe files suit alleging a violation by the state of these requirements and the court finds that the state has failed to negotiate in good faith, it "shall order the State and the Indian Tribe to conclude such a compact within a sixty-day period." 25 U.S.C. § 2710(d)(7)(B)(iii); Pet. App. 98a. If a compact is not concluded within the sixty-day period, the court will then order mediation under 25 U.S.C. § 2710(d)(7)(B)(iv), Pet. App. 98a — an order which the state can disregard if it is willing to give up the limited right to regulate Indian gaming granted by Congress through the compact process.[9]

The Seminole Tribe sought the remedy provided by IGRA (J.A. 18a) because of the State's refusal to negotiate over various

8. As explained at p. 5, *supra*, IGRA provides that class III gaming may be conducted on Indian lands only if "conducted in conformance with a Tribal-State compact entered into by the Indian Tribe and State...." 25 U.S.C. § 2710(d)(1); Pet. App. 93a. That provision of IGRA was intended to delegate to the states an optional role in regulating Indian gaming — a role they did not have under this Court's decision in *Cabazon*, 480 U.S. 202. However, Congress did not give the states the power to block class III gaming by refusing to enter into gaming compacts. Rather, it enacted provisions requiring the states to negotiate in good faith, and providing for remedies in the event the states refused.

9. If the state refuses to participate, the mediation proceeds without it. The tribe's proposal would be the one selected by the mediator and used by the Secretary of the Interior as the basis for prescribing procedures to regulate tribal gaming. 25 U.S.C. § 2710(d)(7)(B)(iv); Pet. App. 98a; *see supra* at p. 6.

forms of gaming which the State "permits" its citizens to conduct.[10] Granting the relief sought would not compel a discretionary act because the obligation to negotiate in good faith is not discretionary; it is a statutory duty imposed on the state and its officials. *Cf. NLRB v. Insurance Agents' Int'l*, 361 U.S. 477, 487-88 (1960) (statutory requirement of "good faith" negotiations creates a "duty on the parties," notwithstanding the wide discretion afforded with respect to terms). *See also NLRB v. Katz*, 369 U.S. 736 (1962); R. Gorman, *Labor Law*, Ch. XX, The Duty to Bargain in Good Faith, pp. 399-495 (1976).

The court of appeals confused the Governor's discretion regarding the terms to be included in a compact with his plain duty under IGRA to negotiate in "good faith." The Eleventh Circuit's premise, that discretion in the exercise of statutory duties precludes judicial enforcement of an express limitation on that discretion imposed in the same statute (Pet. App. 23a-24a), is not supported by *Ex parte Young*. There, the Court recognized the distinction between an officer's discretion and limitations on that discretion. Attorney General Young had contended that the court could not control his discretion whether or not to enforce the challenged state statute. 209 U.S. at 158. The Court acknowledged the general rule of noninterference with an officer's discretion, but upheld the injunction: "An injunction to prevent him from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Id.* at 159.

Moreover, *Ex parte Young's* reference to the general rule of

10. The Tribe argued below that the Governor failed to negotiate in good faith by refusing to negotiate various forms of casino gaming that the State "permits" within the meaning of 25 U.S.C. § 2710(d)(1)(B). The district court's summary judgment ruling that the State did not, in fact, "permit" such gaming and is not required to negotiate for those games, Pet. App. 43a, is on appeal to the Eleventh Circuit. That appeal has been stayed pending resolution of this case. Pet. App. 84a.

noninterference with an officer's discretion, *id.* at 158, did not refer to the court's *jurisdiction* to grant injunctive relief against state officers notwithstanding the Eleventh Amendment, but to the quite different question of when any injunction is appropriate. In IGRA, Congress has made a determination that injunctive relief to enforce the duty to negotiate in good faith is appropriate. Therefore *Ex parte Young's* discussion of discretion has no application here.

Other cases have also recognized the distinction between intruding upon an official's discretion and enforcing limits placed on an official's discretion by statute or by the Constitution. *Work v. United States*, 267 U.S. 175 (1925), held that although a federal officer's discretion may not be controlled through mandamus, if his duty is "discretionary within limits," then "he may be controlled by injunction or mandamus to keep within them." *Id.* at 177.[11] *See also Heckler v. Chaney*, 470 U.S. 821, 834-35 (1985) (although federal agency decision whether to take enforcement action is generally discretionary, where Congress has limited that discretion, courts may enforce those limits under the Administrative Procedures Act, 5 U.S.C. § 701(a)(2)); *Silveyra v. Moschorak*, 989 F.2d 1012, 1014-15 (9th Cir. 1993) ("Even where an official's responsibilities are in some respects discretionary, mandamus is appropriate if 'statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised ... have been ignored or violated.' ") (quoting *Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419 v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981), and citing *Work*, 267 U.S. 175).

11. *Work* is relevant because the Court uses the same principles to determine whether sovereign immunity bars a suit against a federal official as it does to determine whether the Eleventh Amendment suit bars a suit against a state official. *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 687 n.22 (1982).

The Eleventh Circuit found that "since IGRA provides a procedure should the state decide not to negotiate, even the mere question of whether the state should negotiate at all is subject to discretion." Pet. App. 23a-24a. But that construct ignores the plain duty IGRA imposes on the Governor to negotiate in good faith, a duty which cannot be avoided by the availability of remedial procedures should the Governor breach that duty. The relief sought by the Tribe is an order either to conclude a compact within sixty days, or to invoke the alternative procedure of mediation. *See supra* at p. 8.[12] The possibility that the Governor might ignore an order and allow the mediation to proceed without him does not affect the *Ex parte Young* analysis, or deprive the federal court of jurisdiction to provide the statutory relief.

C. The Governor May Be Ordered to Negotiate in Good Faith.

All *Ex parte Young* actions are, in reality, suits against the state, because they require state officials *in their official capacities* to comply with federal law, notwithstanding the "obvious impact on the State itself." *Pennhurst* at 104; *see also id.* at 105 (calling *Young* a "fiction," and noting the "well-recognized irony" that under *Ex parte Young* an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not under the Eleventh Amendment).

The court of appeals' conclusion that the action is against the

12. While the Governor may ignore an order under 25 U.S.C. § 2710(d)(7)(B)(iii), Pet. App. 98a, to conclude a compact within sixty days, if he did he would be ordered to submit a proposed compact to mediation under 25 U.S.C. § 2710(d)(7)(B)(iv), Pet. App. 98a. That order would itself be allowable under *Ex parte Young*, either as a form of prospective injunctive relief or as ancillary to the earlier award of prospective injunctive relief (i.e., the order to compact within sixty days). *See Quern v. Jordan*, 440 U.S. 332, 349 (1979).

state, because IGRA imposes a duty on and remedies against "the State" and not state officials, (Pet. App. 24a), does nothing to undermine the applicability of the *Ex parte Young* doctrine. A state "can act only through its officials." *Pennhurst*, 465 U.S. at 114 n.25. In *Ex parte Young* and its progeny, the Court has repeatedly compelled state officials to comply with federal law limitations which are applicable by their terms to the *states*. *See, e.g., Milliken v. Bradley,* 433 U.S. 267, 288-90 (1977) (state officials ordered to comply with Equal Protection Clause of Fourteenth Amendment); *Edelman*, 415 U.S. at 654 & n.3 (state officials ordered to comply with federal regulations regarding "State plan" and "State-established time standards"). Simply put, federal mandates to a state are enforceable against the state officials who implement state action.

Ex parte Young rejected the argument that the official sought to be enjoined must be named in the statute as the official whose duty it is to act. The Court stated:

> In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.
>
> It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced . . . . The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.

209 U.S. at 157.

In this case, it is undisputed that Governor Chiles entered into compact negotiations with the Seminole Tribe in his capacity as Governor. Having lawfully undertaken that responsibility, he cannot now invoke sovereign immunity in an effort to insulate himself from litigation to vindicate the federal rights guaranteed by the Indian Gaming Regulatory Act. If the Eleventh Amendment applies and renders the State immune, *Ex parte Young* provides a basis for relief against the Governor.

III.

HANS V. LOUISIANA SHOULD BE REVIEWED AND DEEMED NOT APPLICABLE TO SUITS BY INDIAN TRIBES AGAINST THE STATES.

Repeated calls for overruling *Hans v. Louisiana,* 134 U.S. 1 (1890), have been unsuccessful.[13] In this case *Hans* need not be reviewed if abrogation or *Ex parte Young* yields a reversal. If those arguments fail, Justice Brennan's dissent in *Atascadero State Hospital v. Scanlon,* 473 U.S. 234 (1985), is pertinent.

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13. *Blatchford v. Native Village of Noatak,* 501 U.S. 775, 788 (1991) (Blackmun, J., dissenting); *Dellmuth v. Muth,* 491 U.S. 223, 233 (1989) (Brennan, J., dissenting); *Welch v. Texas Dept. of Hwys. and Pub. Transp.*, 483 U.S. 468, 496 (1989) (Brennan, J., dissenting); *Papasan v. Allain,* 478 U.S. 265, 292 (1986) (Brennan, J., concurring in part and dissenting in part); *Green v. Mansour,* 474 U.S. 64, 74 (1985) (Brennan, J., dissenting); *Pennhurst State Sch. and Hosp. v. Halderman,* 465 U.S. 89, 140 (1984) (Stevens, J., dissenting). *See also* Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term,* 64 S. Cal. L. Rev. 51 (1990); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation,* 83 Colum. L. Rev. 1889 (1983).

Justice Brennan called for a complete reexamination of *Hans*, concluding:

> [T]he current doctrine intrudes on the ideal of liberty under law by protecting the States from the consequences of their illegal conduct. And the decision obstructs the sound operation of our federal system by limiting the ability of Congress to take steps it deems necessary and proper to achieve national goals within its constitutional authority.

Id. at 302 (Brennan, J., dissenting, joined by Blackmun, Marshall and Stevens, JJ.). Here, the Court need not undo *Hans* altogether, but only consider its applicability to tribal suits brought under the Indian Commerce Clause, which uniquely present the federalism concerns warranting review of *Hans*. Protecting Indian tribes from state misconduct, insuring a safe and sound union by placing Indian matters in the hands of the central government, enforcing a textual constitutional commitment to the exclusive role of the national government in Indian affairs, are all important reasons for reviewing *Hans*.

Indeed, the role of the Indian Commerce Clause and the reasons why it evidences state acceptance of overriding congressional power can be gleaned from *Atascadero's* state sovereignty explanation of *Hans:*

> The Framers believed that the States played a vital role in our system and that strong State governments were essential to serve as a "counterpoise" to the power of the Federal Government. *See, e.g.*, The Federalist, No. 17, p. 107 (J. Cooke ed. 1961); The Federalist No. 46, p. 316 (J. Cooke ed. 1961).

Atascadero, 473 U.S. at 238-39, n.2. In contrast, the Framers recognized that the Indian Commerce Clause counteracted the powers of the states. The clause rejected "counterpoise" in favor of exclusive federal authority over Indian affairs. *Worcester v. Georgia; County of Oneida v. Oneida Indian Nation, supra.*

The language of Article III echoes the relinquishment of state sovereignty on which we focus. The original draft of Article III provided that "[t]he jurisdiction of the supreme tribunal shall extend . . . to such other cases, as the national legislature may assign, as involving the national peace and harmony. . . ." 2 M. Farrand, *Records of the Federal Convention of 1787*, pp. 146-147 (rev. ed. 1937). The jurisdiction was appellate, "except in...those instances, in which the legislature shall make it original." *Ibid. See Atascadero*, 473 U.S. at 263, n.14 (Brennan, J., dissenting). Ultimately the preamble to the Constitution articulated the quest for harmony: "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility. . . ." Those principles were embodied in Article III, which as adopted, preserved the concepts of judicial and congressional powers designed to promote pacific relationships. In light of the troubled history of Indian/state relations, the combination of Article I, Section 8, Clause 3 and Article III provides strong evidence that the states acknowledged and accepted Congress' authority to create federal judicial remedies to effectuate its exclusive Indian commerce power.

The *Atascadero* reading of *Hans* — that the Eleventh Amendment "barred a citizen from bringing a suit against his own State in federal court, even though the express terms of the Amendment do not so provide," 473 U.S. at 238, is tied to the belief that "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Id.* at 239 n.2. Since the Constitution expressly provided

that the states were to be stripped of their powers over Indian tribes, and Article III expressly provided that the federal courts were to have jurisdiction over cases arising under the laws of the United States, it requires no reach to conclude that *Hans*' broad interpretation of the Eleventh Amendment does not apply to suits brought by Indian tribes pursuant to express congressional authorization. One can accept the long line of cases spawned by *Hans* which are said to stand for the proposition that " 'the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III,' *Pennhurst II,* 465 U.S. at 98," *Atascadero* at 243, n.3, and still find that, in the Indian Commerce Clause, the states recognized Congress' power *vis a vis* tribes, and Congress' ability to invoke federal judicial authority to enforce that power.

This is not to say that the states consented to being sued by tribes in the plan of convention. *Blatchford* bars that argument. 501 U.S. at 782. But the states did give up their sovereign rights to control their commerce with Indian tribes — empowering Congress to undertake that task at the same time the states empowered Congress to create federal question jurisdiction when domestic tranquility required it to do so. *Hans v. Louisiana's* rejection of the argument that the text of the Eleventh Amendment left the states subject to suit by its own citizens was not based on constitutionally created immunity. *Hans* relied on the principle that the Eleventh Amendment did not need to establish states' immunity because the judicial power did not contemplate such suits. *Hans,* 134 U.S. at 15. Thus the states' immunity is derived from the common law, independent of the Constitution. While Article III alone does not breach the immunity, *Hans* does not preclude Congress from explicitly authorizing the federal courts to hear an Indian tribe's suit against a state.

Congress' explicit authorization is beyond peradventure

here. The IGRA congressional abrogation of State sovereign immunity is both specific and "unmistakably clear in the language of the statute." *Dellmuth v. Muth,* 491 U.S. 223, 228 (1989) (*citing Atascadero State Hosp. v. Scanlon*, 473 U.S. 232, 242 (1985)). The statute provides:

> The United States district courts shall have jurisdiction over . . . any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith . . . .

25 U.S.C. § 2710(d)(7)(A)(i). A separate paragraph states:

> An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

25 U.S.C. § 2710(d)(7)(B)(i).

This Court has demanded the "simple but stringent test" of clarity as a means of balancing abrogation versus the Eleventh Amendment. *Dellmuth,* 491 U.S. at 227-28. In *Dellmuth,* abrogation was available because the Education of the Handicapped Act was "assumed" to have been enacted pursuant to Congress' authority under § 5 of the Fourteenth Amendment. *Id.* at 227 n.1. Here, if the abrogation power is encompassed by the Indian Commerce Clause or the *Pennsylvania v. Union Gas* analysis, Congress' clear statement carries the day. But if neither

abrogation nor *Ex parte Young* suffices, then that clear statement of congressional intent demonstrates the importance of preventing *Hans* from infringing upon the fundamental goals of the Indian Commerce Clause.

In IGRA, Congress intended to abrogate state immunity. Article I, Section 8, Clause 3 expressly provides a grant of exclusive power to Congress to regulate Indian Commerce. Article III of the Constitution grants power to federal courts to hear cases arising under the laws and Constitution of the United States. The Eleventh Amendment's plain language *does not* preclude the Tribe's suit. *Hans v. Louisiana* has been candidly conceded to be unfaithful to the text of the Amendment. *Atascadero*, 473 U.S. at 238. Fidelity to federalism forms the foundation for *Hans*. But distinguishing *Hans* in this case is faithful to federalism, because of the history and plain language of the Indian Commerce Clause.

Hans v. Louisiana and *Ex parte Young* have forged powerful doctrines; the latter an acknowledged fiction, the former constructed on language which does not support its scope. Added now is another facet — the Indian Commerce Clause. "The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character." *Kagama*, 118 U.S. at 381. The relation of the Indian Commerce Clause and the Eleventh Amendment need not be anomalous or complex. The plain language of the Eleventh Amendment excludes tribes. The plain language and history of the Indian Commerce Clause supports a surrender of state sovereignty. *Hans v. Louisiana* need not, and does not, preclude the Seminole Tribe's federal court suit against the State of Florida.

CONCLUSION

For the foregoing reasons, the decision of the Eleventh Circuit Court of Appeals that the Eleventh Amendment confers immunity upon the State of Florida and its Governor should be reversed, and the case remanded for further proceedings to determine the merits of the Tribe's claims under the Indian Gaming Regulatory Act.

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IN THE

Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner

v.

STATE OF FLORIDA and
LAWTON CHILES, Governor,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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§ 849.15, Fla. Stat. 4

§ 849.16, Fla. Stat. 4

Other Authorities

S.Rep. 100–446, 100th Cong., 1st Sess. 1–5
1988 U.S.C.C.A.N. 3071–3076. 2

CONSTITUTIONAL PROVISIONS

Art. I, § 8, cl. 3, U.S. Const.:

> The Congress shall have power...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Eleventh Amendment

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Fourteenth Amendment:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 5. The Congress shall have power to enforce by appropriate legislation the provisions of this article.

STATEMENT OF THE CASE

This case arises under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* and 18 U.S.C. § 1166–68 (hereafter IGRA). IGRA establishes a comprehensive statutory scheme for the regulation of gambling on Indian lands. It is the result of years of legislative debate and prior judicial decisions. S.Rep. 100–446, 100th Cong., 1st Sess. 1–5, 1988 U.S.C.C.A.N. 3071–3076.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court held that, on reservation lands, the Indian tribes could engage in unregulated gambling activities if such gambling activities were not criminally prohibited by the State. Congress quickly passed IGRA in order "to provide for a statutory basis for the operation of gaming by Indian tribes," "to provide a statutory basis for the regulation of gaming by Indian tribes," and to create the National Indian Gaming Commission with authority to establish standards for gaming on Indian lands. 25 U.S.C. § 2702.

IGRA creates three classes of gambling. The issues before this Court relate to class III gambling, which includes all forms of gambling other than traditional Indian social games and bingo. 25 U.S.C. § 2703(8). Class III gambling is lawful only in a State which permits such gambling. 25 U.S.C. § 2710(d)(1)(B).

A Tribe desiring to conduct class III gambling must request the State in which the Indian lands are located to negotiate a Tribal-State compact governing such gambling. IGRA requires that "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). If the State fails to negotiate or fails to negotiate in good faith, IGRA provides that a Tribe can initiate a suit in federal district court [25 U.S.C. § 2710(d)(7)(A)(i)] to seek an order from the court forcing the State to the

negotiating table for the conclusion of a compact within 60 days. 25 U.S.C. § 2710(d)(7)(B)(iii)

If the court finds that the State has not acted in good faith, then "the court shall order the State and the Indian tribe to conclude such a compact within a 60 day period." *Id.* If a compact is not completed within that time, "the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact." 25 U.S.C. § 2710(d)(7)(B)(iv) The mediator is required to select the one of the two submitted compacts which best comports with IGRA, other applicable federal law, and the findings and order of the court. *Id.*

The State and the Tribe then have 60 days to agree to the selected compact. 25 U.S.C. § 2710(d)(7)(B)(v)–(vii) If the parties still cannot agree to execute a compact within that time, then the mediator transmits the selected compact to the Secretary of the Interior. At this point, the Secretary is empowered to prescribe regulations for the implementation of class III gambling consistent with the terms of the chosen compact, IGRA, and State law. 25 U.S.C. § 2710(d)(7)(B)(vii)

On January 29, 1991, the Seminole Tribe asked the State of Florida to commence negotiations pursuant to IGRA for a compact governing the Tribe's proposals for gambling on Tribal lands. [J.A. 21a] On March 4, 1991, the Tribe submitted a proposed compact providing for Tribal operation of poker, and machine or computer-assisted games which duplicate poker, bingo, pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo. [J.A. 24a–25a, 29a] By letter of May 24, 1991, the State agreed to discuss poker and other games allowed by § 849.085, Fla. Stat., but rejected all of the Tribe's other compact requests as being contrary to Florida law and not the proper subject of negotiation under IGRA. [J.A. 36a–39a] The letter set forth the State's preliminary legal position on the scope of

games believed by the State to be subject to compact negotiations and also contained suggestions for issues to be negotiated related to regulatory matters. On June 18, 1991, the Tribe submitted additional games that it asserted met the objections set forth in the May 24 letter from the State, and, at the same time, requested expansion of negotiations to include casino gambling. [J.A. 40a]

On August 22, 1991, representatives of the Tribe met with State representatives to discuss the Tribe's compact request. The State agreed to negotiate concerning poker and other card games, raffles, and parimutuel wagering on dog and horse racing and jai alai, all of which are permitted by Florida law. In response to questions from the State representatives, there was some discussion of how the Tribe would conduct these games if a compact were approved. The State, however, refused to negotiate any machine or computer-assisted gaming, which the State determined would violate §§ 849.15 and 849.16, Fla. Stat. Specifically, the State refused to negotiate a compact covering any form of casino gambling. [Joint Pretrial Stipulation at 4-5, ¶ 6, Pet. App. 45a]

On September 17, 1991, the State and the Tribe met to continue discussions. The State expressed its willingness to discuss a compact for games permitted under the interpretation of IGRA set forth in its September 13 letter. [Pet. App. 45a–46a] On September 19, 1991, the Tribe filed its complaint in the district court alleging that the State of Florida had failed to negotiate in good faith for the completion of a Tribal-State compact for gambling operations pursuant to IGRA. [J.A. 12a]

In its complaint, the Tribe requested an order directing the State to enter into a compact within 60 days pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii). In addition, the Tribe sought a declaratory judgment that the State permitted casino gambling and slot machines, thereby seeking to

make those types of gambling subject to negotiation under IGRA. [J.A. 18a–19a]

The State moved to dismiss the complaint based on the immunity afforded it by the Eleventh Amendment. [J.A. 49a] The district court issued its order denying the motion on June 18, 1992. *Seminole Tribe v. Florida*, 801 F.Supp. 655 (S.D. Fla. 1992) [Pet. App. 26a] An appeal to the Eleventh Circuit Court of Appeals ensued.

The Eleventh Circuit Court of Appeals reversed the district court's denial of Florida's motion to dismiss based on the State's Eleventh Amendment immunity, remanding with instructions to dismiss the case. The Court of Appeals held that the Eleventh Amendment immunity of the States could not be abrogated by Congress pursuant to its authority under the Indian Commerce Clause, Art. I, § 8, cl. 3, U.S. Const., and that none of the established exceptions to the State's Eleventh Amendment immunity, including *Ex parte Young*, were applicable. Therefore, the Court found that the federal courts lacked subject matter jurisdiction. *Seminole Tribe v. Florida*, 11 F.3d 1016 (11th Cir. 1994) [Pet. App. 1a]

During the pendency of the appeal in the *Seminole* case, the State of Florida and the Seminole Tribe agreed to proceed with cross-motions for summary judgment on the merits in the district court. After extensive briefing and oral argument, the district court issued an order and opinion defining the proper scope of negotiations for Florida and the Seminole Tribe. The court found that:

> IGRA does not require all Class III gaming activities to be included in compact negotiations merely because the State permits specific Class III gaming activities in some form; and second that, contrary to the Tribe's argument, the State does not permit those specific types of Class III gaming activities which it now seeks to include in the

> Tribe-State compact negotiations. Having concluded that these proposed Class III activities need not be included in the compact negotiations, we hold that ***the State has not violated the IGRA's good faith requirement*** by refusing to include them in the negotiations

[Pet. App. 43a, 82a](emphasis added) This order is currently on appeal to the Eleventh Circuit Court of Appeals. That appeal has been abated during the pendency of the instant case.

JURISDICTIONAL NOTE

The *amicus* brief of the State and Local Legal Center raises a substantial jurisdictional question under Article III, contending that the role of federal courts under IGRA is "non-judicial" and that any order a federal court may enter against a State is unenforceable. If so, the Center's Article III argument and its jurisdictional concerns merit close attention.

The State views the provisions of IGRA as far more coercive. Indeed, the argument of the Seminole Tribe and its *amici,* and the ruling of several Courts of Appeal, lend great weight to its view. Here, for example, the federal district court construed the Florida laws governing gambling. Presumably, it was prepared to enforce the provisions of IGRA based on its interpretation of Florida law and to specify what the State was required to negotiate. Further, there is nothing in IGRA that requires the Secretary of the Interior to accept the State's interpretation of its own laws. In fact, the Secretary would probably consider himself bound by a federal court's construction of State law, even if contrary to the State's interpretation.

SUMMARY OF THE ARGUMENT

The judgment of the Eleventh Circuit dismissing the Tribe's suit under IGRA against the State should be affirmed. Congress lacks the power under the Indian Commerce Clause to abrogate the Eleventh Amendment sovereign immunity of the States. Additionally, *Ex parte Young* does not apply to allow suit against the Governor for prospective relief in this case.

The Eleventh Amendment to the United States Constitution embodies the doctrine of sovereign immunity, limiting the grant of judicial authority set forth in Article III of the United States Constitution. The Eleventh Amendment prohibits the bringing of suit against a State in federal court absent the consent of the State. By its terms, the Amendment applies to "any suit in law or equity," and therefore applies regardless of the relief sought.

The State has not expressly consented to this suit nor can implied consent be found by this Court given the extremely limited circumstances under which implied consent can exit. Consent has been found in the "plan of the convention" for suits between sister States and by the United States against a State. Implicit consent in the "plan of the convention" has specifically been found not to exist between the States and Indian Tribes. *Blatchford v. Native Village of Noatak*, ___ U.S. ___, 111 S.Ct. 2578 (1991).

Consent to suit has also been based on certain provisions of the Constitution where this Court has found the power to abrogate the States' Eleventh Amendment immunity, such as § 5, Fourteenth Amendment. The Fourteenth Amendment allows federal intrusion into the executive, legislative, and judicial powers previously reserved to the States. This intrusion was ratified by the States, and effectuated by specific language in § 5 of the Amendment. The

conclusion that the States thus consented to Congress' power to abrogate the States' Eleventh Amendment sovereign immunity where it is "necessary to enforce" the Amendment is understandable. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

Consent to Congresses' power to abrogate has also recently been found in the Interstate Commerce Clause. In *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), a plurality of this Court held that clause gives Congress the power to regulate the relations between States in order to foster free trade nationally. Viewed in light of the consent of the States to suit in the "plan of the convention" with respect to other States, and the unique aspects of the Interstate Commerce Clause in its restraint of the States, this Court concluded that such a consent to abrogate could be found in that Clause. But the power to abrogate is only available when the commerce power is incomplete without it and the abrogation is necessary to accomplish the goals of Congress under the Interstate Commerce Clause. Such is not the case here.

Petitioner's assertion that the Indian Commerce Clause also grants to Congress consent to abrogate the States' Eleventh Amendment sovereign immunity is without merit. The Indian and Interstate Commerce Clauses were treated as completely separate provisions in the constitutional convention. Consent found in the Interstate Commerce Clause is premised on a structural understanding of the relations between the States and the Federal Government. The powers granted under the Indian Commerce Clause are of a different character. The Indian Commerce Clause grants Congress complete authority over the Tribes, while the Interstate Commerce Clause grants Congress power to control the relations among the States within the ambit of that Clause. There is no basis to import consent to the power to abrogate under the Interstate Commerce Clause to cases involving the Indian Commerce Clause. *Cotton Petroleum v.*

New Mexico, 490 U.S. 163 (1989). It is not necessary for Congress to subject the States to suit under IGRA in order for Congress to achieve its purposes. Those purposes can be achieved under Congress' complete power over the Tribes; no State involvement is necessary.

If this Court concludes that it cannot distinguish the Interstate Commerce Clause from the Indian Commerce Clause or any other Article I power on a principled basis, then this Court's recent plurality decision finding abrogation under the Interstate Commerce Clause should be overruled. For if Congress has the power to abrogate the States' Eleventh Amendment sovereign immunity under any Article I power, then that immunity has been rendered a nullity.

Nor can the Tribe sue the Governor of Florida under the doctrine of *Ex parte Young*, 209 U.S. 123 (1907), in order to avoid the States' immunity. Although this is not an action for damages, under IGRA it can only be a suit against the State. When an action is one against the State, it is barred regardless of the relief sought.

The requested relief also seeks to compel the Governor to act in an area where he has discretion as to whether and how to act. *Ex parte Young* is therefore inapplicable. Moreover, in that the Tribe seeks a mandatory injunction, not the prohibition of unconstitutional conduct envisioned by *Young*, it asks for relief not available under *Young*.

IGRA utilizes State law to determine what types of class III gaming are permissible. The complaint in this case seeks a determination of State law and a mandatory injunction ordering the Governor to negotiate for the types of gambling set forth in the injunction. This suit, and IGRA to the extent it authorizes this suit, impinge on the State's discretion as to the appropriate interpretation of State law and the proper terms for negotiations. This is a serious intrusion on

the discretion of the State in the formulation of its public policy not warranted by the *Ex parte Young* doctrine. Although the Tribe asserts that the State can ignore the coercive orders of a federal court called for by IGRA, this assertion lacks merit. Ignoring a federal court order impugns the court's dignity and constitutes contempt.

To the extent IGRA's commands are mandatory and the orders of a federal court are mandatory, the State is faced with a choice of negotiating for the terms dictated by the Tribes or facing the coercive orders of the federal courts. IGRA thus treats the States as an administrative subdivision of the federal government in violation of the Tenth Amendment. *New York v. United States*, ___ U.S. ___, 112 S.Ct. 2408 (1992)

Contrary to a new assertion made by the Petitioner, *Hans* v. Louisiana, 134 U.S. 1 (1890), should not be overruled or limited. It has stood for over a century and has been the basis of many decisions of this Court and many laws passed by Congress. The States did not consent to suit in federal court by the Indian tribes in the "plan of the convention" and the States did not consent in the Indian Commerce Clause to Congress abrogating the States' immunity. The relationships of the States and the Tribes with respect to their sovereign immunity, confirmed four years ago in *Blatchford v. Native Village of Noatak*, ___ U.S. ___, 111 S.Ct. 2578 (1991), should be left alone.

ARGUMENT

I.

THE ELEVENTH AMENDMENT DOES NOT PERMIT A SUIT BY AN INDIAN TRIBE AGAINST A STATE OR ITS GOVERNOR BASED ON THE ALLEGED FAILURE OF THE STATE TO NEGOTIATE A GAMING COMPACT IN GOOD FAITH

The Indian Gaming Regulatory Act provides that if a State refuses to negotiate or fails to negotiate in good faith with an Indian tribe for the conclusion of a gaming compact, then the Tribe may sue the State in federal court. 25 U.S.C. § 2710(d)(7)(A)(i) The Seminole Tribe brought suit against the State and its Governor alleging that Florida had failed to negotiate in good faith for the conclusion of a gaming compact. The district court denied a motion to dismiss based on the State's Eleventh Amendment immunity; the Eleventh Circuit Court of Appeals reversed holding that Congress lacked the power to abrogate the State's immunity pursuant to the Indian Commerce Clause and that no exceptions applied.

Prosecution of this suit violates the State's Eleventh Amendment sovereign immunity which bars suit against the State in federal court absent the States' consent, regardless of the relief sought. Congress lacks the authority under the Indian Commerce Clause to abrogate such immunity.

A. The Eleventh Amendment Embodies the Concept of Sovereign Immunity in its Entirety

Sovereign immunity is a common law doctrine which shields the sovereign from the coercive power of the courts. This immunity is absolute without the consent of the sovereign. *Employees of the Department of Public Health and Welfare v. Dept. of Public Health and Welfare, State of Missouri*, 411 U.S.279, 288 (1973). In *Hans v. Louisiana*, 134 U.S. 1 (1890), this Court found:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.

Id. at 13 (quoting Alexander Hamilton, Federalist # 81). *See also, Monaco v. Mississippi*, 292 U.S. 313, 322-27 (1934). This immunity is absolute, regardless of the relief sought. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, ___ U.S. ___, 113 S.Ct. 684, 688 (1993).

In 1793, this Court assumed original jurisdiction over a suit brought by a citizen of South Carolina against the State of Georgia. *Chisolm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793). This Court's decision, to hold Georgia liable upon certain bonds, "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *See, Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97–98 (1984). Although the Eleventh Amendment was adopted in direct response to the holding in *Chisolm*,

> this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III.

Pennhurst, 465 U.S. at 98. Thus, in *Hans v. Louisiana*, 134 at 15, the Court found that "federal jurisdiction over suits

against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States."

The Eleventh Amendment embodies the broad and fundamental principles of sovereign immunity. *Welch v. Texas Dept. of Highways*, 483 U.S. 468, 472, 486 (1987); *Green v.* Mansour, 474 U.S. 64, 68 (1985); *Atascadero State Hospital* v. Scanlon, 473 U.S. 234, 238 (1985). This limitation on the judicial power of the United States is a "compelling force," *Ford Motor Co. v. Indiana*, 323 U.S. 459, 467 (1945), extending to all suits regardless of the relief sought. *Puerto Rico*, 113 S.Ct. at 688. By its very terms the Amendment applies to "any suit in law or equity," a premise acknowledged in *Cory v. White*, 457 U.S. 85, 90 (1982):

> *Edelman* did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the State treasury is sought. [footnote omitted] It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the state itself simply because no money judgment is sought.

See also, Pennhurst, 465 U.S. at 114 n.25 ("[T]here was no suggestion [in *Edelman*] that damages alone were thought to run against the State while injunctive relief did not" thereby barring damage claims but not injunctive claims.) This bar is necessary "to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico*, 113 S.Ct. at 689. *See also, Fitts v. McGhee*, 172 U.S. 516, 527-28 (1899).

The Court has frequently recognized this broad intent:

> The fact that the motive for the adoption of the 11th Amendment was to quiet grave apprehensions that were extensively entertained with respect to

> the prosecution of state debts in the federal courts cannot be regarded...as restricting the scope of the amendment to suits to obtain money judgments. The terms of the amendment...were not so limited.

Missouri v. Fiske, 290 U.S. 18, 27 (1933). *Accord, Employees*, 411 U.S. at 292 (the Eleventh Amendment reversed the holding in *Chisolm* and more generally restored the original understanding of sovereign immunity.)

In *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994), this Court held that the Port Authority, a bistate compact clause entity, was not entitled to Eleventh Amendment immunity. Referring to the "impetus for the Eleventh Amendment," it acknowledged that jeopardy of the public fisc was the most salient factor. *Id.* at 404. However, the Court also recognized that this is not the only issue for Eleventh Amendment analysis, discussing the "twin reasons" for the passage of the Eleventh Amendment: 1) to protect the public fisc; and 2) to accord the States the respect owed them as members of the federation. *Id.* at 400. The Eleventh Amendment "emphasizes the integrity retained by each State." *Id. Accord*, *Fitts v. McGhee*, 172 U.S. at 528 (Eleventh Amendment's purpose was to prevent the indignity of subjecting the States to the coercive process of the federal courts.)

The Eleventh Amendment is a "fundamental protection" and is

> rooted in a recognition that the States, although a Union, maintain certain attributes of sovereignty, including sovereign immunity...It thus accords the States the respect owed them as members of the federation.

Puerto Rico, 113 S.Ct. at 688-89. No matter what relief is requested, suits against the State violate the fundamental value of sovereign immunity as embodied in the Eleventh Amendment and are barred, absent the consent of the sovereign State. Despite this overwhelmingly clear standard, the Petitioner and the Solicitor General argue that the Eleventh Amendment can be abrogated. Their logic fails because they cannot point to any consent in the "plan of the convention" which will support this power.

B. Florida has not Consented to this Suit

The Eleventh Amendment embodies the historical understanding of the immunity of a State as a sovereign entity. It stands for the

> presupposition of our constitutional structure...that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty. ...and that a State will therefore not be subject to suit in federal court *unless it has consented to suit,* either expressly or in the plan of the convention.

Blatchford v. Native Village of Noatak, ___ U.S. ___, 111 S.Ct. 2578, 2581 (1991) (emphasis added). Consent in this context can be express or implied, although implied waiver or consent "is not a doctrine commonly associated with surrender of constitutional rights." *Welch*, 483 U.S. at 473; *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). In this case, Petitioner has never claimed that the State of Florida expressly waived its immunity. Implied consent has previously been found by this Court only by virtue of: 1) an absolute consent in the "plan of the convention"; or 2) consent in that plan to allow Congress to abrogate the States' immunity. Neither of these doctrines of implied consent can

be applied to a suit by an Indian tribe against the State based on the Indian Commerce Clause. *Blatchford*, 111 S.Ct. at 2582-83.

1. *Plan of the Convention*

The States surrendered a limited quantum of their sovereignty and consented to two classes of lawsuits when the Constitution was adopted in 1789.

> States of the Union still possessing attributes of sovereignty shall be immune from suits, without their consent, save where there has been "a surrender of this immunity in the plan of the convention."

Monaco, 292 U.S. at 322-23 (quoting A. Hamilton, (Federalist # 81))

This Court has found two types of consent in the "plan of the convention." In order to ensure the permanence of the Union, suits by the United States against a State are permitted. *U.S. v. Texas*, 143 U.S. 621 (1892). The constitutional plan also requires that controversies between States be the subject of judicial settlement.

> The waiver or consent, on the part of a State, which inheres in the acceptance of the constitutional plan, runs to the other States who have likewise accepted that plan and to the United States as the sovereign which the Constitution creates.

Monaco, 292 U.S. at 328-30. *See also*, *Blatchford*, 111 S.Ct. at 2582. Art. III, § 2, U.S. Const., bolsters this finding of consent by specifically granting to the federal courts "judicial power" over "controversies to which the United States shall be a party" and "controversies between two or more

States." Of critical note, this "plan of the convention" consent does not extend to the Indian tribes.

> [I]t would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 111 S.Ct. at 2582-83 (emphasis in original). Neither is there any indication of such a consent in Article III of the Constitution. In addition to the consent found in the "plan of the convention," the States have consented to a limited power in Congress unilaterally to abrogate the States' Eleventh Amendment sovereign immunity.

2. *Abrogation*

In this case, the Seminole Tribe argues that Congress, in the passage of IGRA, intended to and did abrogate the States' sovereign immunity pursuant to its authority under the Indian Commerce Clause, Art I, § 8, cl. 3, U.S. Const. Congress lacks such power.[1]

Petitioner's arguments ignore this Court's pronouncement that abrogation of the States' sovereign immunity places considerable strain on the concepts of federalism which inform the Eleventh Amendment and upsets the fundamental balance set by the Constitution. *Dellmuth v.*

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1 The court below determined that the IGRA was passed pursuant to the Indian Commerce Clause. [Pet App. 17a-18a] *Amici* for the Tribes argue that the Interstate Commerce Clause provided authority for this Act and therefore the Congress had authority to abrogate the States' sovereign immunity under *Pennsylvania v. Union Gas*. This issue is not properly raised by *amici*. *UPS v. Mitchel*, 451 U.S. 56, 60 n.2 (1981)

Muth, 491 U.S. 223, 227 (1989). In fact, the power to abrogate has been found by this Court in only two contexts: 1) § 5, Fourteenth Amendment; and 2) the Interstate Commerce Clause, Art. I, § 8, cl. 3. Neither applies or lends force to the Tribe's argument.

a. § 5, Fourteenth Amendment

The enactment of the Fourteenth Amendment sanctioned unprecedented intrusions into the legislative, executive, and judicial autonomy previously reserved to the states. *Fitzpa*trick v. Bitzer, 427 U.S. 445, 455 (1976). The prohibitions of the Fourteenth Amendment are directed to the States:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amend. XIV, U.S. Const.

> [The Civil War Amendments] have reference to actions of the political body denominated a State by whatever instruments or in whatever modes that action may be taken.

Quern v. Jordan, 440 U.S. 332, 355 (1979) (quoting *Ex parte Virginia*, 100 U.S. 339, 346–47 (1880)).

Section 5 of the Amendment states that, "The Congress shall have power to enforce by appropriate legislation the provisions of this article." Referring to that section, this Court has held:

> We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment,

> provide for suits against States or state officials which are constitutionally impermissible in other contexts.

Fitzpatrick, 427 U.S. at 456. *Fitzpatrick* arose under the Civil Rights Act to remedy sex discrimination in the State's retirement benefits program. Title VII was passed pursuant to Congress' authority under the Fourteenth Amendment. *Id.* at 453 n.9. This Court held that Congress could authorize actions against the States for damages and attorneys' fees under that authority. *Id.* at 456–57.

The intrusion into the States' legislative, executive, and judicial authority, coupled with the explicit authority to adopt appropriate legislation, give solid ground to the implication that the States were granting to Congress the power to intrude further on their sovereignty by allowing for suit in federal court to enforce the terms of the Amendment. Neither the terms nor the history of the Indian Commerce Clause bear any resemblance to the Fourteenth Amendment in this respect. Terse in the extreme, the clause does not even hint at a surrender of sovereignty.

b. Interstate Commerce Clause

Although supported by a different foundation, this Court has also found the power to abrogate the States' Eleventh Amendment sovereign immunity in the Interstate Commerce Clause. In *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), this Court held that Congress could abrogate the States' Eleventh Amendment sovereign immunity in its enactment of the "Superfund" Law pursuant to its powers under the Interstate Commerce Clause. *Id.* at 23 (plurality). The ruling was grounded on "the special nature of the power conferred by that Clause." *Id.* at 19. The Court stated that the interstate commerce power would be "incomplete without the authority to render States liable in damages" and

that Congress "found it necessary, in exercising this authority, to render [the States] liable." *Id.* at 19-20.

In context, this finding is understandable, even though Justice White, the fifth vote for the majority, concurred without explaining his reasoning. *Id.* at 57. The Interstate Commerce Clause is concerned with maintaining free trade among the states. *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 192 (1989). Under the "dormant" commerce clause, the States are restrained in their actions with regard to each other in the absence of federal legislation. Under Congress' active powers, the aim is still to foster free trade among the States. This clause, both dormant and active, is unique among the Article I powers granted to the national government - it restrains the States and expressly allows regulation of the economic relationships among the States. If the States consented to suits by sister States in the "plan of the convention," then it is logical to contend that the States consented to Congress' power to subject them to suit under the power granted to police the relationships of the States to each other.

Both § 5, Fourteenth Amendment and the Interstate Commerce Clause grant powers to Congress which are addressed to the States. The Indian Commerce Clause, on the other hand, is a grant of power to Congress to control the affairs of the Indian tribes. The States did not submit to suits by Indian tribes in the "plan of the convention," and neither did the States consent to Congress' power to abrogate the States' Eleventh Amendment sovereign immunity in the "plan of the convention" by reason of the adoption of the Indian Commerce Clause. No consent can be found to support the abrogation of the States' Eleventh Amendment immunity pursuant to the Indian Commerce Clause.

3. *The Indian Commerce Clause*

In order to overcome the States' sovereign immunity, the Court must find consent. Petitioner argues that the States have consented to Congress' power to abrogate the States' Eleventh Amendment sovereign immunity pursuant to its power under the Indian Commerce Clause. This argument lacks merit.

> As Chief Justice Marshall observed in *Cherokee Nation v. Georgia*, 5 Pet. 1, 18, 8 L.Ed. 25 (1831): "The objects to which the power of regulating commerce might be directed, are divided into three distinct classes — foreign nations, the several states, and Indian Tribes. When forming this article, the convention considered them as entirely distinct."
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> * * *
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> It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation,...the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.... The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause.

Cotton Petroleum, 490 U.S. at 192 (citations omitted).

The Interstate Commerce Clause and the Indian Commerce Clause are wholly dissimilar and the latter provides no

principled basis whatsoever for finding that the States consented to suit by the Indian Tribes. *Blatchford*, 111 S.Ct. at 2583. The States cannot be presumed to have agreed to something indirectly which they clearly did not agree to directly, *i.e.*, consent to suit by tribes in derogation of the States' sovereign immunity. This distinction is consistent with the distinctions made by this Court in *Cotton Petroleum*. The implied consent found in *Union Gas* from the Interstate Commerce Clause is based on a structural understanding of the relationship of the state and federal governments, including the consent derived from the "plan of the convention." That understanding does not apply to the Indian Commerce Clause.

The Indian Commerce Clause gives Congress exclusive and plenary power *over the Indian tribes*. This power is *complete* — complete enough to allow for the elimination of a tribe as a legal entity.

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.

United States v. Wheeler, 435 U.S. 313, 323 (1978). *See, e.g.* Alabama and Coushatta Indians of Texas Termination Acts, 25 U.S.C. §§ 721–728.

Petitioner's historical analysis of the Indian Commerce Clause brings it only to this point — that the power of Congress over the Tribes is exclusive and complete with respect to the *Indian tribes*. It does not follow from that proposition that the power to abrogate the *States'* Eleventh Amendment sovereign immunity is even arguably found in the Indian Commerce Clause.

The Tribe's sovereignty is wholly dependent on the pleasure of Congress. States are not so dependent; they created

a Union premised upon their sovereignty remaining intact. As opposed to its complete power over the Indian tribes, Congress has only the limited powers granted to it by the Constitution to control the relations among the States. The right to abrogate Eleventh Amendment sovereign immunity is available to Congress under the Interstate Commerce Clause only if its power is "incomplete" and abrogation is "necessary" for the exercise of the commerce power. *Union Gas*, 491 U.S. at 19–20 Neither of these conditions is met with respect to IGRA and the Indian Commerce Clause.

Congress' power under the Indian Commerce Clause is complete. With regard to Indian affairs, there are no limitations on Congress' authority to pass legislation affecting the Tribes. Subjecting the States to suit is not necessary either to fulfill that power or to effectuate the stated purposes of IGRA. The purposes of IGRA include providing a statutory basis for the operation and regulation of Indian gambling. 25 U.S.C. § 2702 Inclusion of the States in the regulatory scheme was not necessary. IGRA could have been written to allow the Tribes to regulate themselves, to subject them to federal regulation, to allow ***voluntary*** participation of the States, or to allow for suit by the United States to enforce the terms of the Act. *See, Employees*, 411 U.S. at 285–86 (FLSA allows for suit by the Secretary of Labor.). None of these schemes would have required that the States be subject to suit by a Tribe in derogation of their Eleventh Amendment sovereign immunity. Contrary to the Tribe's assertion that the remedy crafted by Congress in IGRA is "consistent with the core values of the Eleventh Amendment," [Pet Br. at 21 n.5], that remedy ignores "the very object and purpose of the Eleventh Amendment [which] were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." *Fitts v. McGhee*, 172 U.S. at 527–28

IGRA's scheme plainly mandates State involvement in permitting casino gambling on tribal lands. The Tribe even interprets IGRA as allowing a federal court to decide that the Tribe is allowed to conduct casino gambling that the State believes is denied to all other citizens by State criminal law. Both fly in the face of the Tenth Amendment. As this Court observed in *New York v. United States*, 112 S.Ct. 2408, 2424 (1992):

> [W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.

The Tenth Amendment does not allow federal officials to avoid accountability in this manner. *Id.* Casino gambling remains politically unpopular in most States and has been defeated in Florida in three referenda in the past two decades. If Congress wishes to control casino gambling on reservations, it has the complete authority to do so and such a decision should be made "in full view of the public." *Id.*

4. Union Gas Should be Overruled

Congress chose to command the States to be involved in Indian gambling and created an enforcement remedy that can only be based on an extension of the plurality opinion of this Court in *Union Gas*. The differences between the Indian and Interstate Commerce Clauses militate strongly against extending that holding to this case. The Indian Commerce Clause provides no authority for Congress to abrogate the States' Eleventh Amendment sovereign immunity. On issues of constitutional law, the doctrine of *stare decisis* is not strictly followed. *Edelman*, 415 U.S. at 671 & n.14. *Stare decisis* is a "principle of policy" not an "inexorable

command." *Payne v. Tennesee*, 115 L.Ed.2d 720, 737 (1991). That is especially true in cases such as this where the issue is constitutional and "correction through legislative action is practically impossible." *Id.* Where a precedent is "unworkable or badly reasoned" the Court should not feel restrained. *Id.* This is the case with the plurality holding of *Union Gas*, a relatively recent, not widely relied upon holding. The divergent interpretations regarding the validity of the remedy found in IGRA is evidence of the difficulty of reconciling that opinion with the existing body of law. In contrast, this Court has refused to overturn *Hans* v. Louisi*ana,* a unanimous decision upon which a minimum of 17 decisions of this Court and innumerable acts of Congress rely. *Welch*, 483 U.S. at 494 n.27, 495–96 (Scalia concurring).

If this Court concludes that it cannot limit *Union Gas* to the uniqueness of the Interstate Commerce Clause, or if credence should be given to Petitioner's *amici's* argument that IGRA was adopted under the Interstate Commerce Clause, then *Union Gas* should be reconsidered and overruled. For a full discussion of this point, see Brief of *amicus,* States, which we adopt here by reference.

Union Gas held that the Interstate Commerce Clause's plenary authority to regulate commerce provides a basis for the power to abrogate. An expansive reading of this power would render the States' Eleventh Amendment sovereign immunity a nullity. All of Congress' power is plenary when read in conjunction with the Supremacy Clause. All of Congress' power is granted by the States with a concomitant reduction in the sovereign power of the States and all of Congress' powers are "carved out" of the States' power. *Fitzpatrick*, 427 U.S. at 456.

A broad reading of *Union Gas* that ignores the unique nature of the Interstate Commerce Clause renders all Article I powers unrestricted and available as a basis for

overruling the States' Eleventh Amendment sovereign immunity, leaving it without any force. Article I powers are not, however, unrestricted. For example, Congress can regulate the publishing industry under the Interstate Commerce Clause as that power is necessarily limited by the First Amendment. *See*, *New York* 112 S.Ct. at 2418 (analyzing limitations on Congress' power in a Tenth Amendment context.) Incidents of State sovereignty can be protected from Article I powers. In *New York*, it was the Tenth Amendment which did so; in this case the Eleventh Amendment protects the States' sovereign immunity, an incident of State sovereignty. *Cf. Id.*

In *Fitzpatrick*, this Court found that the Fourteenth Amendment, given its unique history and purpose, allowed suits that would be "constitutionally impermissible in other contexts." 427 U.S. at 456. If a broad reading of *Union Gas* is adopted, there would be no "other contexts" — Congress could subject the States to suit at its pleasure under any of its Article I powers. Arrogating such power to Congress renders the fundamental protection of the Eleventh Amendment a nullity and such a reading should be rejected.

The Indian Commerce Clause provides no basis upon which to find the power to abrogate the States' Eleventh Amendment sovereign immunity. There was no consent in the "plan of the convention" for direct suits by Indian tribes against States and, therefore, there was no consent in the "plan of the convention" to Congress' power to create such causes of action. This distinction controls this case and prevents the importation of the power to abrogate from the Interstate to the Indian Commerce Clause. The judgment of the Eleventh Circuit should be affirmed.

II.
THE SEMINOLE TRIBE CANNOT AVOID FLORIDA'S ELEVENTH AMENDMENT SOVEREIGN IMMUNITY SIMPLY BY INVOKING *EX PARTE YOUNG* AND NAMING THE GOVERNOR

The Tribe argues that even if Congress lacked the power to abrogate the States' Eleventh Amendment sovereign immunity under the Indian Commerce Clause, suit can be maintained against the Governor of Florida under the doctrine set forth in *Ex parte Young,* 209 U.S. 123 (1907). The Solicitor General joins in this contention.

The ruling in *Young* has not been given the expansive interpretation the Tribe and the Solicitor General suggest here. *See, Pennhurst*, 465 U.S. at 102. It is a narrow exception and "has no application in suits against the States and their agencies which are barred regardless of the relief sought." *Puerto Rico,* 113 S.Ct. at 688. *Ex parte Young* does not apply here because: A) this is in reality an action against the State; B) the acts sought to be mandated are discretionary, not ministerial; and C) there is neither an allegation of the existence of an unconstitutional State law nor a request to enjoin an unconstitutional action by a State officer.

A. This Suit is in Reality One Against the State

The doctrine in *Ex parte Young* is inapplicable if the suit is in reality one against the State. *Quern,* 440 U.S. at 345 n.17; *Cory*, 457 U.S. at 89. Under IGRA, the suit brought by the Petitioner is plainly one against the State. IGRA's commands are directed solely against the State and require the exercise of the State's legislative, compacting, and contracting powers, and further require that decisions be made

as to the application, *vel non*, of its criminal and civil authority. It is the *State* which must negotiate in good faith [25 U.S.C. § 2710(d)(3)(A)]; it is the *State* which must enter into compacts with the Tribes [25 U.S.C. § 2710(d)(1)(C)]; it is the *State* which may be sued [25 U.S.C. § 2710(d)(7)(A)(i)]; it is the *State* which will be ordered to complete a compact within 60 days [25 U.S.C. § 2710 (d)(7)(B)(iii)]; it is the *State* which will be ordered to submit its last best offer for a compact to a mediator [25 U.S.C. § 2710(d)(7)(B)(iv)].

In other analogous situations, this Court has steadfastly refused to adopt the position of the Tribe and the Solicitor General. In *Cory v. White*, a suit was brought under the Federal Interpleader Act by the executor of the estate of Howard Hughes to determine the domicile of the decedent for death tax purposes. The State officials who were sued raised the Eleventh Amendment as a defense and this Court specifically declined to narrow its reach, declining to hold that all suits for injunctions are permissible under *Young*. *Cory*, 457 U.S. at 91. Similarly, in *Worcester County Trust v. Riley*, 302 U.S. 292, 296 (1937), this Court stated:

> [A] suit nominally against individuals, but restraining or otherwise affecting their action as state officers, may be in substance a suit against the state, which the Constitution forbids[.]

See also, Quern, 440 U.S. at 345 n.17 (quoting *Osborn v. Bank of U.S.*, 9 Wheat. (22 U.S.) 738 (1824)(key inquiry is whether the state officer is in fact the real party in interest or whether he is only a nominal party.)) *See also, Great Northern Life v. Read*, 322 U.S. 47, 51 (1944)(State cannot be controlled by courts through suits against officials.) This

Court has never ruled otherwise.[2] *See, Hawaii v. Gordon* 373 U.S. 57, 58 (1963) (The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter).

Even if the relief is not compensation, but the prevention or discontinuance of the wrong, the compulsion which the court is asked to impose may be against the sovereign although nominally directed against the individual. If so, the suit is barred. *Pennhurst*, 465 U.S. at 101 (relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter); *Scheuer v. Rhodes*, 416 U.S. 232 (1974). It is the essential nature and effect of the proceeding which determines whether it is a suit against the State. *Ford Motor Co.*, 323 U.S. at 464. The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would restrain the government from acting or *compel it to act. Dugan v. Rank*, 372 U.S. 609, 620 (1963)(emphasis added)(suit for injunction against officials of the United States actually against the sovereign).

In this case, the Tribe has attempted to avoid the State's Eleventh Amendment sovereign immunity by naming the Governor as the chief executive officer of the State. The

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2 In cases where damages were at issue, the Court seems to have developed a shorthand test — damage claims are barred as being against the sovereign. However, this must be considered a two tier test, because if the claim is for injunctive relief, the question of whether the claim is in reality one against the State remains. Were this not the case, then all of the language cited above addressing whether the case is really one against the State is merely superfluous; the only question that would need to be answered is the damages question. This Court has disavowed such an interpretation of *Edelman*. *Cory*, 457 U.S. at 90 n.2; *Pennhurst*, 465 U.S. at 114 n.25.

Court, in *Ex parte Young*, specifically disavowed such a subterfuge.[3]

> The things required to be done by the actual Defendants were the very things which, when done, would constitute a performance of the alleged contract by the state.

Id. at 151; *Quern*, 440 U.S. at 345 n.17 The same is true here. Any decree would be an order compelling the State to act, as the only "duties" imposed by IGRA fall upon the State. This not the type of injunction envisioned by *Young*. The injunction in *Young* sought to prevent a State Attorney General from doing "that which he had no legal right to do." *Ex parte Young*, 209 U.S. at 159. The mandatory injunction requested here seeks to order the Governor to do that which IGRA commands the *State* to do.

It is the effect of the relief sought which determines whether the suit is one against the state. In *Pennhurst*, 465 U.S. at 107-08, all of the relief ordered was institutional and official in character and relief under *Young* was denied. The same is true in the instant case. The relief requested is institutional in that it runs against the only party recognized by IGRA, the *State*; and it is official in that it seeks an order telling the Governor how to act in his official capacity as Governor. An order enjoining the Governor to take action under the dictates of IGRA would require of the Governor the very things IGRA commands of the State. Such a mandatory injunction would impermissibly compel the State to take action and interfere with the public administration. If the Tribe's argument were accepted, the

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3 "Where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made." *Governor of Georgia v. Madrazo*, 1 Pet. 110, 123–24 (1828).

"narrow exception" set forth in *Young* would virtually eviscerate the Eleventh Amendment and any request for prospective injunctive relief would be permissible.

The Tribe asserts that the Governor is responsible for negotiating a compact with the Tribe. But the argument fails to distiguish the Governor from the State. Moreover, no citation to IGRA will support the Tribe's assertion. The only authority cited for this proposition is a provision of the Florida Constitution vesting executive authority in the Governor. [Pet. Br. at 23] But this provision does not vest him with authority to negotiate a compact. Compacting is traditionally a legislative act. Under the federal Compact Clause, interstate compacts are generally approved by the State legislatures and then by Congress. Similarly, other state compacts with Indian tribes are legislatively approved. *See, e.g.*, § 285.165, Fla. Stat. (Water Rights Compact between the Seminole Tribe and the State of Florida) If the legislature assumed the role of negotiator with the Tribes, the Legislature could not be sued under *Ex parte Young* because the Legislature is unquestionably "the State." This suit is, in reality, one against the State, seeking a mandatory injunction ordering the Governor to exercise his discretion in a certain way, and it is barred by the Eleventh Amendment.

B. The Acts Which are Mandated by IGRA Involve Discretion

Petitioner asserts that the acts sought to be enjoined are not discretionary and therefore are properly subject to the *Ex parte Young* exception. (Pet Br. 25–31) The Tribe asserts that only the requirement to negotiate in good faith is subject to the injunction and that the discretion as to the terms of the negotiation remains unaffected. Finally, the

Tribe asserts that the State can simply refuse to participate in the remedial actions ordered by the Court.

The complaint in this action shows that the Tribe was not merely seeking an order requiring the State to negotiate in good faith, but a declaration that certain games were to be the subject of negotiations based on the Tribe's assertion that those games were "permitted" in Florida. [J.A. 18a–19a] Any order from a court addressing this issue necessarily impinges on the discretion of the State to determine the extent of the negotiations *in accordance with State law.*

By limiting negotiations to gambling activities which are "permitted" by the State, IGRA relies upon State law in the implementation of the federal act. 25 U.S.C. § 2710(d)(1)(B). *See also*, 18 U.S.C. § 1166 (incorporating State law for federal enforcement purposes). In order to grant the Tribe's requested relief, a federal court must interpret State law and order the State to comply. That is prohibited.

> It is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.

Pennhurst, 465 U.S. at 106. By asking for an interpretation of what Florida "permits" under its own law, Petitioner requested just such an intrusion.

The Tribe's suggestion that the State can merely refuse to participate in the remedial process militates against its argument. If the State can refuse, then the very willingness to negotiate becomes a discretionary act. The Solicitor General even characterizes the "duty" to negotiate as a "conditional one." [Sol. Br. at 17] If so, then it is not a ministerial duty for which a mandatory injunction will lie. *Young*, 209 U.S. at 158. Petitioner cannot have it both ways;

either the State's participation is discretionary or it is not. If it is, then *Ex parte Young* does not apply no matter how its holding is interpreted.[4] If the States' participation is mandatory, then IGRA violates the Tenth Amendment.

The Eleventh Circuit did not address the Tenth Amendment issue because it had not been raised in the District Court. [Pet. App. 2a–3a at note 2] This Court's decision in *New York* v. *United States* had not been issued at the time of the filing of the complaint and motions in this case. Petitioner asserts that the dictates of IGRA are mandatory, thereby allowing an injunction to be issued under *Ex parte Young*. This Tenth Amendment question is therefore subsumed within the second question posed by the Petitioner and accepted for review by this Court. The Court may appropriately address the issue.

New York v. United States, 112 S.Ct. 2408 (1992), held that the "take title" provision of the Low-Level Radioactive Waste Policy Act of 1985 was a violation of the Tenth Amendment. This was based on a finding that, under the Act:

> A State may not decline to administer the federal program. No matter which path the State chooses, it must follow the direction of Congress.

Id. at 2429. But, as the Court pointed out, Congress has authority over individuals, not the States. *Id.* at 2422. Hence, it can encourage, but not compel, a State to regulate in a particular way. For example, under the Spending Clause, Congress may condition the receipt of federal funds on compliance with certain dictates, *id.* at 2423, and thus highway funds may be conditioned on the adoption of a minimum drinking age. *South Dakota v. Dole*, 483 U.S. 203,

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4 If the States' role is discretionary, then the Tribes have another jurisdictional problem — if the State has no duty, then the failure to act does not raise a case or controversy for Article III jurisdictional purposes.

206 (1987). Further, Congress can offer the States an alternative of regulating according to a federal standard or having State law preempted. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981).

Congress afforded the States neither of these alternatives in the passage of IGRA. The Act provides that the State "shall negotiate." 25 U.S.C. § 2710(d)(3)(A). If the State fails to negotiate, or negotiate in good faith, then it will be subject to the coercive process of the federal courts. 25 U.S.C. § 2710(d)(7)(A)(i). The coercive elements of IGRA, requiring the States to negotiate under pain of federal court compulsion, reduce the States to mere administrative subdivisions of the federal government. IGRA violates the Tenth Amendment when it puts the States in this position *New York*, 112 S.Ct. at 2434.

Petitioner asserts that the State can simply refuse to participate. (Pet Br. at 26 n.9) But that course risks a finding of contempt and undermines the dignity of the federal courts. IGRA empowers a federal court to ***order*** the parties to conclude a compact within 60 days and then to ***order*** the parties to submit a "last best offer" to a mediator.[5] 25 U.S.C. § 2710(d)(7)(B)(iii) and (iv). Failing that, the Secretary of the Interior is empowered to impose regulations governing the conduct of class III gambling, presumably making ***his*** interpretation of State law the final word. 25 U.S.C. § 2710(d)(7)(B)(vii). Moreover, there is no limitation

5 In part V of the opinion of the Eleventh Circuit below [Pet. App. 24a–25a], the court creates a remedy for the Tribes which is not found in IGRA and which upsets the balance of the parties which was carefully crafted in the passage of IGRA. The court may not legislate; if IGRA's process is barred by the Eleventh Amendment, then it is up to Congress to rebalance the interests of the parties in the creation of a new statutory scheme. This issue is pending on a cross-petition for certiorari in this Court, docket number 94-219.

on his authority to include duties for the State in his proposed regulations.

By subjecting the States to the choice of negotiating and entering into a compact or being subject to the coercive orders of the District Court, IGRA violates the Tenth Amendment. The relief sought under IGRA against the Governor directs him in the exercise of his discretion; no such relief is available under *Ex parte Young* absent an allegation of an unconstitutional State law or an unconstitutional action by State officers.

C. There is no allegation of an unconstitutional State law or an unconstitutional action by State officers

In *Ex parte Young*, the Attorney General of Minnesota was enjoined from enforcing an unconstitutional state law. This Court held that the unconstitutional state law was void and therefore could not impart to the responsible official the immunity of the State. *Id.* at 159-60. In this case, there is no allegation that the actions of the Governor are in furtherance of an unconstitutional law. Nor is there an allegation that his conduct violates the Constitution. Therefore, the rationale of *Young* is inapplicable. This Court found *Ex parte Young* similarly inapplicable in *Worcester County Trust v. Riley:*

> the present suit is not founded on the asserted unconstitutionality of any state statute and the consequent want of lawful authority for official action taken under it.

302 U.S. at 300; *Mansour*, 474 U.S. at 68 (*Ex parte Young* exception applies to "a suit challenging the constitutionality of a state official's action in enforcing [a] state law"); *Employees*, 411 U.S. at 294 n.9 (suits may be brought in federal court against state officers allegedly acting unconstitutionally).

In *Ex parte Young* the Court held that where "the act which the state attorney general seeks to enforce be a violation of the federal constitution" then he will be stripped of the State's immunity in recognition of the "superior authority of that Constitution." *Id.* at 160-61; *Pennhurst*, 465 U.S. at 104. This is an obvious reference to the Supremacy Clause which prevents the States from enacting laws in conflict with federal enactments. *See, Mansour,* 474 U.S. at 68 ("Relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause.") When a State enactment conflicts with a federal law, it is unconstitutional under the Supremacy Clause and an injunction under *Young* would be available to prevent enforcement of the State law. Without an unconstitutional State law or rule, there is no basis for an injunction. *Compare, e.g., Edelman*, 415 U.S. at 653 (allegation that Edelman, the Director of the Cook County Department of Public Aid, administered the federal AABD program pursuant to the Illinois Public Aid Code, which conflicted with the federal regulations prescribing time standards for processing applications. This conflict rendered the code unconstitutional.) The lack of an allegation of the unconstitutionality of either a State law or the action of a State officer renders the doctrine of *Ex parte Young* inapplicable.

III.
A TRIBAL EXCEPTION TO *HANS v. LOUISIANA* SHOULD NOT BE ALLOWED

Petitioner argues that the holding in *Hans v. Louisiana* should be limited so as not to be applicable to suits by Tribes against States. In *Hans*, this Court held that the Eleventh Amendment prohibited suits against a State by citizens of that State even though the text of the Amendment did not literally state it. This holding was a confirmation of the sovereign immunity which the States retained upon creation of the Union. *Pennhurst,* 465 U.S. at 98.

The Tribe's argument would subject the States to suits by the Tribes on the same footing as suits by other States or the United States and require overruling this Court's holding in *Blatchford*. The only basis for suits by other States or the United States is the consent found in the "plan of the convention." This Court previously held that the States did not give such consent with regard to the Indian tribes. *Blatchford*, 111 S.Ct. at 2582–83.

In making this argument, Petitioner relies on language found in the Constitution's preamble. (Pet. Br. 33) This argument again is a "plan of the convention" argument which has been rejected by this Court. The States did not accede to Congress' power to abrogate their sovereign immunity in favor of the Tribes, any more than they consented to suits by the Tribes in the "plan of the convention."

The Petitioner's argument that a clear statement of intent to abrogate the States' immunity suffices to avoid the application of *Hans* is without merit. Congress cannot arrogate power to itself by simply stating its intent in bold clear language. In *New York v. United States*, 112 S. Ct. 2408 (1992), this Court found that Congress had similarly attempted to subject the States to an unconstitutional requirement in the

"take title" provision of the Low-Level Radioactive Waste Policy Act. That clear statement of intent did nothing to overcome the violation of the Tenth Amendment found there.

Petitioner alludes to various policy considerations which it believes justify limiting *Hans*. However, in *Pennhurst*, this Court said:

> [C]onsiderations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a state.

465 U.S. at 123. Similarly, policy considerations suggested by the Tribe cannot override the fundamental limitation on the power of Congress or the judiciary embodied in the States' Eleventh Amendment sovereign immunity.

Finally, it is unnecessary and unwise at this time to add another layer of complexity to the analysis of the States' Eleventh Amendment sovereign immunity by creating an exception to *Hans*. The power to abrogate is not necessary for Congress to fulfill its duties and responsibilities under the Indian Commerce Clause. And, contrary to Petitioner's false plea, [Pet. Br. at 32] there is *no* State misconduct here in need of correction. If Congress wants to authorize virtually unrestricted gambling, it should take the responsibility for doing so. In sum, then, the relationship between the States and the Tribes is best left alone, both entities maintaining their traditional sovereign immunity. One hundred and four years of adherence to *Hans* should not be abandoned.

CONCLUSION

The Eleventh Amendment immunity of the States cannot be abrogated by Congress pursuant to its power under the Indian Commerce Clause, and the doctrine of *Ex parte Young* does not provide a way around that immunity in this case. Therefore, the questions presented by the Petitioner should both be answered in the NEGATIVE, and the holding of the 11th Circuit should be AFFIRMED, pending resolution of the cross-petition of the State of Florida, docket number 94-219.

Respectfully submitted,

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SEMINOLE TRIBE OF FLORIDA,

Petitioner,

vs.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF FLORIDA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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No. 94-12

In The

Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

vs.

STATE OF FLORIDA AND LAWTON CHILES, GOVERNOR OF FLORIDA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

The questions presented in the certiorari petition are whether the Eleventh Amendment precludes Congress from authorizing tribal suits against the states, and whether *Ex parte Young* permits a governor to be sued for prospective injunctive relief to enforce provisions of the Indian Gaming Regulatory Act (IGRA). The Respondents' Brief, and the *amici curiae* Briefs of the National

Governors' Association, *et al.* and the State of California, *et al.*, address those questions and seek to expand the issues in this case with Tenth Amendment and article III arguments. Central to all of the efforts of Respondents is a view that IGRA offends state sovereignty. That view is incorrect, and the arguments seeking to escape *Ex parte Young* and abrogation are not persuasive.

ARGUMENT

I.

IGRA RESPECTS STATES' RIGHTS

The Respondents and their *amici* err in their attempts to portray IGRA as violative of states' rights. IGRA empowers the states; it does not encroach upon their rights. Before IGRA, the states had no power to regulate gaming on tribal lands. *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207 (1987). Respondents admit Congress could have excluded the states from any role in Indian gaming. (Resp. Br. 9) ("[Congress'] purposes can be achieved under Congress' complete power over the Tribes; no state involvement is necessary"). Therefore, IGRA's grant of power to the states, conditioned only on the duty to negotiate in good faith with Indian tribes, is protective of federalism. The themes of conflict and intrusion sounded by the Respondents and their *amici* misstate Congress' approach to balancing the federal/state/tribal interests at stake.

> To give Congress its due, the statute should be seen as a statement of its plenary power that does not raise constitutional questions. Congress could have bypassed the states, but in giving the states a role Congress did not cut into state sovereignty, it expanded it.

Richard L. Barnes, *Indian Gaming: Congress Sends the Tribes Into a Constitutional Fray, But Did It Intend To?* 64 Miss. Law J. 591, 596 (1995).

Thus, analysis of this case must begin with Congress' unique Indian Commerce Clause powers, and the Supremacy Clause duty of state officials to conform to federal laws enacted pursuant to those powers. *Ex parte Young,* 209 U.S. 123 (1908), provides a mechanism for judicial enforcement of the duty to follow federal law.

II.

EX PARTE YOUNG APPLIES

The Respondents' answer to *Ex parte Young* is that the Tribe's suit is really against the State; that IGRA's mandated duties involve discretion; and that the Tribe has not charged the Respondents with violating the Constitution. (Resp. Br. 27-36). The short reply is: (1) *all Ex parte Young* suits are against a state; (2) under IGRA there is no "discretion" to negotiate in bad faith; and (3) it is the Supremacy Clause and vindication of federal law, not just constitutional claims, which justify the *Ex parte Young* doctrine. The Respondents have failed to acknowledge *Young's* fiction, which allows suits against state officials to obtain prospective injunctive relief against states.

The Governors, recognizing that *Young's* fiction runs against states, add a "necessity" argument: "There can be no plausible claim that any structural *need* to vindicate the supremacy of federal law, on which *Young* rests, requires that state officials be subject to a judicial order that 'the state can disregard' for such an order does not '*secure* compliance with federal law'." Governors' *amicus* Br. 17 (emphasis added by Governors) (internal references to Petitioners' and United States' Briefs omitted). The Governors have misstated the Tribe's position,

confusing the goal of a compact with the means of securing it — good faith negotiations. Securing the Tribe's right to good faith negotiations *via Ex parte Young* serves the Supremacy Clause.

State disregard of a lack-of-good-faith final judgment is at the price of losing the legal ability to collaterally attack the resulting gaming. Such a judgment vindicates the supremacy of federal law by demanding adherence to IGRA's good faith requirement — a duty that Congress imposed to solve the delicate tri-sovereign dilemma, as the *sine qua non* for state participation. There can be no quarrel with the fact that under the Indian Commerce Clause Congress could have excluded the states from Indian gaming. Given the genesis of the Indian Commerce Clause (Pet. Br. at 18-21), IGRA's mandate of good faith negotiation is a proper use of the Clause's power. *Ex parte Young* is a principled basis for insuring that the federal formula for protecting state, federal and tribal interests is observed by the state beneficiaries.[1]

The justification for *Ex parte Young* — to insure compliance with federal law — is equally compelling whether that compliance is to vindicate Fourteenth Amendment rights, Indian Commerce Clause powers or other federally imposed responsibilities:

> [T]he Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presumes some authority to order state officials to comply.

1. The states have received a benefit in IGRA. Indeed, the attempts to portray IGRA's grant of state authority and concomitant good faith negotiation obligation as unconstitutional perverts the concept of federalism which the states so vigorously espouse. Congress' sensitivity to federalism ought to be applauded by the states, not condemned.

New York v. United States, 112 S. Ct. 2408, 2430 (1992) (*citing, inter alia, Ex parte Young*). *See also, Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984) ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.").

The Respondents' offer of *Cory v. White*, 457 U.S. 85 (1982), as an antidote to *Ex parte Young* misses the mark. The *Cory v. White* statutory interpleader action was between two states seeking to tax Howard Hughes' estate. No federal interest was at stake; no allegation of federal law violation was made. Advancing *Cory v. White* as "analogous" (Resp. Br. 28) reveals the weakness of Respondents' argument. *Cory v. White* does not question the established doctrine that suits against state officials to compel compliance with federal law are not barred by the Eleventh Amendment.

Nor is the Respondents' new tack, that the Governor of Florida lacks the authority to negotiate, a tenable position. (Resp. Br. 30). This attempt to avoid *Ex parte Young* by claiming that the good faith duty is legislative is belied by the Respondents' Answer to the Complaint, which asserted that "Defendants State of Florida and Lawton Chiles, in his capacity as Governor of the State of Florida have negotiated in good faith" with the Tribe. J.A. 46a (Answer); *see also*, J.A. 15a-17a, 22a-23a ¶¶ 2 and 3, 36a, 41a (attachments to Complaint, admitting that the general counsel to the Governor represented the Governor *and* the State in compact negotiations). That admission by the Governor of Florida (and acknowledgment by other Governors that the power to negotiate is theirs)[2] undermines his attempt to avoid *Ex parte*

2. The Governors' Association *amicus* Brief, p. 20 n. 11, states: "With the exception of Kansas, we are aware of no evidence casting doubt on the complete authority of the Governor in each State, not only to negotiate, but to enter into compacts under IGRA."

Young by clothing the federal duty to negotiate with a state legislative cloak. The Governor accepted the federal duty to negotiate in good faith. He is a proper party for *Ex parte Young* purposes.

Finally, there is no force to the Respondents' argument that deciding IGRA good faith by deciding the scope of gaming permitted under Florida law (Resp. Br. 32), somehow adversely affects the *Ex parte Young* analysis. Under IGRA, good faith and scope of gaming are federal questions. Interpreting state law is a proper role for federal courts. *See Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Many federal laws expressly incorporate or refer to state law. *See, e.g.*, Assimilative Crimes Act. 18 U.S.C. § 13; Johnson Act, 15 U.S.C. § 1172; Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2672, 2674. Other statutes have been judicially construed to incorporate state law. *See, e.g., DeSylva v. Ballentine*, 351 U.S. 570, 580 (1956) ("The scope of the federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law."); *Kamen v. Kemper Fin. Serv., Inc.*, 500 U.S. 90, 98 (1991) ("federal courts should 'incorporat[e] [state law] as the federal rule of decision' " *quoting United States v. Kimbell Foods, Inc.*, 400 U.S. 715, 728 (1979)).

Using state law to resolve the good faith federal question reflects Congress' respect for state interests. Instead of imposing a federal Indian gaming regime on the states, IGRA sought to accommodate state interests. *Ex parte Young* is an available method for reconciling the state and federal interests and tribal rights by insuring state officials' compliance with federal laws.

III.

IN IGRA, CONGRESS ABROGATED THE STATES' ELEVENTH AMENDMENT IMMUNITY

The Respondents acknowledge that "Congress' power under the Indian Commerce Clause is complete" and that regarding Indian affairs, "there are no limitations on Congress' authority to pass legislation affecting the Tribes." (Resp. Br. 23). They acknowledge that it "was not necessary" for Congress to have included the states in Indian gaming, *id.*, but then complain that allowing states to be sued by tribes constitutes "the indignity of subjecting a state to the coercive process of judicial tribunals at the insistence of private parties." *Ibid.*

The Respondents' argument is anomalous. IGRA expanded state authority, giving states a voice to which they were not otherwise entitled. Since Congress has plenary power, it must have the power to abrogate state immunity when it is enlarging state authority. To contend otherwise is inconsistent with the recognition of Congress' complete and unlimited powers in the area of Indian affairs. If Congress creates a role for the states, and then deems it necessary to hold the states answerable for their role, the states suffer no indignity. And, Tribes are not "private parties," but rather sovereigns whose lawsuits stand on different dignity footing than individuals' lawsuits. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 780 n. 1 (1991).

The Respondents say they "understand" the *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), view that the interstate commerce power needs to provide authority for Congress to render states liable to private parties for damages. (Resp. Br. 19-20). But they balk at abrogation power authorizing Indian tribes to seek prospective non-monetary relief, claiming that "complete power over Indian tribes" is different from the constitutional power "to

control relations among the states." *Id.* at 23. The Respondents mistakenly perceive the Indian Commerce Clause function. The clause takes all power from the states; it does not simply provide for federal rule over tribes. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 559 (1832). Thus, the states must face an indisputable constitutional principle which arises from the fact that they long ago ceded all rights *vis a vis* tribes, save those which Congress allows. *Compare U.S. Term Limits, Inc. v. Thornton,* 63 U.S.L.W. 4413, 4420 (1995):

> "The state governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that Act [adoption of the Constitution], *exclusively* delegated to the United States." The Federalist No. 32, at 198.
>
> * * *
>
> As we have frequently noted, "[t]he states unquestionably do retain a significant measure of sovereign authority. They do so, however, *only to the extent that the Constitution has not divested them of their original powers* and transferred those powers to the Federal Government. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 549 (1985) (internal quotation marks and citation omitted) (emphasis added); see also *New York v. United States,* 505 U.S. ___, ___(slip op., at 8-9 (1992).

The states retain authority and power to validly legislate and regulate matters which affect interstate commerce. The Interstate Commerce Clause only prohibits those acts which interfere with

such commerce. *West Lynn Creamery, Inc. v. Healy,* 114 S. Ct. 2205, 2211 (1994):

> Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. . . . (quoting *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 273-274 (1988)).

Indeed, the most important aspect of the Interstate Commerce Clause was "as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the General Government." *West Lynn Creamery,* 114 S. Ct. at 2211 n. 9 (*citing* 3 M. Farrand, *Records of the Federal Convention of 1787,* p. 478 (1911), *quoting* James Madison). In contrast, the Indian Commerce Clause left the states with no sovereign authority in the sphere of Indian affairs and commerce; that authority is exclusively delegated to the Congress by the Constitution. Thus, it is not inconsistent with the Eleventh Amendment, or the common law sovereignty upon which the amendment is founded, to conclude that the necessary and complete exercise of the exclusive federal Indian Commerce Clause powers must include Congress' right to abrogate state immunity when it expands state authority into Indian areas where the states would otherwise be wholly excluded. *Compare Morton v. Mancari,* 417 U.S. 535 (1974):

> Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status to legislate on behalf of federally recognized

> tribes. The plenary power of Congress to deal with the social problems of Indians is drawn both explicitly and implicitly from the Constitution . . . [which] singles Indians out as a proper subject for separate legislation.

Id. at 551-552. The *Morton* Court unanimously upheld Indian employment preferences in the Bureau of Indian Affairs. The racial classifications did not violate the Fifth Amendment: "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. The result should be the same in this case.

The distinctions between the Interstate Commerce Clause and the Indian Commerce Clause underscore why the Respondents' invitation to revisit *Union Gas* should be rejected. *Union Gas'* use of the positive and negative Interstate Commerce Clause function as a basis for the power to abrogate is helpful, but not critical to this case. Congress' special powers, duties, and obligations under the Indian Commerce Clause make the abrogation power more necessary than that needed for interstate commerce. (*See* Pet. Br. 19-21; U.S. Br. 22-24). Thus *Union Gas* need not be the basis for decision here.[3]

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3. One *amicus* brief suggests that Congress did not clearly intend to abrogate Eleventh Amendment immunity in IGRA. (Governors' Br. 19-20). Every court which has addressed that question, including the court below, has found the intent to abrogate to be unmistakenly clear. (*See, e.g.*, Pet. Cert. App. 14a-15a (citing cases)); *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994); *Spokane Tribe v. Washington*, 28 F.3d 991 (9th Cir. 1994); *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273 (8th Cir. 1993). *See also*, Note, *Upping the Ante: Allowing Indian Tribes to Sue States in Federal Court Under the Indian Gaming Regulatory Act*, 62 Geo. Wash. L. Rev. 123, 158 (1993) ("No court has even concluded that the question is a close one. Congress clearly has authorized abrogation"). Indeed, neither the Respondents nor the *amici* states assert the no-clear-statement argument.

IV.

THE TENTH AMENDMENT IS NOT AN ISSUE IN THIS CASE

The Brief of the Respondents raises a question as to the consistency of IGRA with the Tenth Amendment. (Resp. Br. 24-25). That question is also advanced and argued in the Brief of the *amici* states (pp. 23-28). The Tenth Amendment issue is not properly before the Court in this case.

As the Respondents acknowledge, the Tenth Amendment issue was not raised in the district court, which thus had no occasion to rule on it.[4] In the Eleventh Circuit, the court noted that the Respondents "raised one issue [the Tenth Amendment issue] for the first time on appeal." (Pet. App. 2a-3a n. 2). The Eleventh Circuit declined to address that issue, relying on its settled practice of not considering issues on appeal which were not raised in the district court. *Id.* That procedural history precludes its presentation here: "We do not reach for constitutional questions not raised by the parties," *Mazer v. Stein*, 347 U.S. 201, 206 n. 5 (1954), or "not raised or resolved in the lower court," *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

This Court's Rule 14.1(a) states: "Only the questions set forth in the petition, or fairly included therein, will be considered by the Court." Only in the most exceptional circumstances will the Court consider issues not presented in the petition. *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992); *United States v. Williams*, 504 U.S. 36 (1992).

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4. Respondents assert that this failure was because this Court's decision in *New York v. United States*, 112 S. Ct. 2408 (1992), "had not been issued at the time of the filing of the complaint and motions in this case." (Resp. Br. 33). But Respondents do not explain their failure to anticipate the Tenth Amendment issue even before the *New York* ruling, or their failure to amend their pleadings after the ruling of this Court.

In this case, the Seminole Tribe's petition for certiorari and Brief on the merits present two Eleventh Amendment questions: an abrogation question, and *Ex parte Young*. The response to the certiorari petition did not quarrel with those two questions nor argue, as is now asserted in Respondents' merits Brief (p. 33), that a Tenth Amendment problem is somehow subsumed in the *Ex parte Young* question.[5] Nor did the Respondents' cross-petition for certiorari (still pending before this Court, *State of Florida v. Seminole Tribe*, No. 94-219) seek to present a Tenth Amendment issue.

Rule 14.1(a) excludes the Tenth Amendment issue from this case. This Court should again "disapprove the practice of smuggling additional questions into a case after we grant certiorari." *Irvine v. California*, 347 U.S. 128, 129 (1954) (Jackson, J.) (plurality).[6]

Finally, there is no extraordinary reason for this Court to address the Tenth Amendment. This case can be decided solely within the parameters of the two Eleventh Amendment questions that have been raised and argued in both the lower courts and this Court. If the Court wishes to address the Tenth Amendment issue, it will find an opportunity to do so in the pending petition for

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5. Respondents' Brief (p. 33) states that because the Seminole Tribe "asserts that the dictates of IGRA are mandatory, thereby allowing an injunction to be issued under *Ex parte Young*" the Tenth Amendment question "is therefore subsumed within the second question posed by the Petitioner and accepted for review by this Court." But the Tribe's argument as to the mandatory nature of the State's duty under IGRA to negotiate in good faith only goes to the *Ex parte Young* exception to Eleventh Amendment immunity, not to any or all other constitutional propositions that might be asserted with respect to that duty.

6. *See also*, R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice*, § 6.26 (7th ed. 1993).

certiorari in No. 94-1029, *Oklahoma v. Ponca Tribe of Oklahoma*. A question presented in that petition concerns the Tenth Amendment implication of IGRA, an issue that was fully canvassed and dealt with by the Tenth Circuit, 37 F.3d 1422 (10th Cir. 1994), which accurately concluded that IGRA poses no unconstitutional usurpation of powers reserved to the states.

V.

THIS CASE IS JUSTICIABLE

One aspect of the *amici* National Governors' Association argument proceeds from this assumption:

> Even if the court agrees with the Tribe's complaint that the state is acting unlawfully (i.e., is failing to negotiate in good faith), the court cannot issue an enforceable order that vindicates the interests asserted in the suit; indeed, real relief for the Tribe ultimately is available only from the Executive Branch.

Amicus Br. of National Governors' Assoc., *et al.* 7. The argument is put this way: "What IGRA provides for, in short is a wholly unenforceable judicial pronouncement." *Id.* at 12. However, the Governors' submission is based upon the erroneous premise that a final judgment finding that a state has failed to negotiate pursuant to IGRA is not "real relief" to the Tribe. It is; such a judgment vindicates the interests asserted in the Seminoles' suit.

The Governors demean the importance of the relief sought, calling it "only a paper vindication" because "the Tribe cannot, in its lawsuit, judicially secure a compact or other authority for Class III gaming." National Governors' Assoc. *amicus* Br. 11. But the Governors overlook the significant legal consequences

which flow from a favorable final judgment on the scope of permitted gaming and a state's refusal to negotiate in good faith. That judgment could foreclose the State from blocking class III gaming through the compacting process and would provide the Tribe with *res judicata* or collateral estoppel protection which would preclude the State's subsequent attack on a mediator's compact, or a Secretary's order, or authorized tribal gaming. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979). The method by which the ultimate gaming rights are achieved (negotiation, mediation, promulgation of rules by the Secretary of the Interior) is not important to article III analysis. The judicially enforceable findings of fact and conclusions of law regarding permitted gaming and good faith lead to an alternative path for securing class III gaming, and provide real relief against future state actions which might attempt to interfere with the tribal gaming.[7]

The other jurisdictional barrier perceived by *amici* is founded on two article III principles: that the judicial power must be conclusive, not advisory, and that the power must not be subject to later administrative review or alteration. IGRA does not offend either principle.

The "general rule" is "that 'executive or administrative duties of a nonjudicial nature may not be imposed on judges

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7. The Respondents do not embrace the Governors' contention; Respondents acknowledge the force and effect of the relief sought:

> The State views the provisions of IGRA as far more coercive. . . . Here for example, the federal district court construed Florida laws governing gambling. Presumably, it was prepared to enforce the provisions of IGRA based on its interpretation of Florida law, and to specify what the state was required to negotiate.

Resp. Br. 6.

holding office under Article III of the Constitution.' " *Morrison v. Olson,* 487 U.S. 654, 677 (1988). And, "Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch." *Plaut v. Spendthrift Farm, Inc.,* 115 S.Ct. 1447, 1453 (1995). The cited cases standing for these rules — *United States v. Ferreira,* 54 U.S. (13 How.) 40 (1851); *Hayburn's Case,* 2 U.S. (2 Dall.) 408 (1792); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.,* 333 U.S. 103 (1948) — demonstrate why they do not apply to IGRA.

Hayburn's Case evolved from a statute making article III judges arbiters of disability pension amounts, leaving the Secretary of Interior free to adopt or reject the awards. In *Ferreira,* a federal court in Florida was authorized by Congress to decide, and report to the Secretary of the Treasury, claims arising from the 1819 treaty which ceded Florida to the United States. The Secretary of the Treasury had the final decisionmaking authority as to payment. *See Morrison v. Olson,* 487 U.S. at 677-678 n. 15; *Interstate Commerce Comm'n v. Brimson,* 154 U.S. 447, 480-83 (1894). In *Chicago & Southern Airlines,* the President had final authority to pass on certificates for foreign air transportation, rendering judicial review of Civil Aeronautics Board orders to be both premature and political questions, beyond the powers of article III courts.

While IGRA specifies a post-judgment role for the Secretary of the Interior, that role does not involve reconsideration of a judicial determination that a state has failed to negotiate in good faith. Thus, the Secretary's role is entirely different from that of the Secretary of War in *Hayburn's Case*; different from that of the Secretary of the Treasury under the legislation considered in *Ferreira*; and different from that of the President in *Chicago & Southern Air Lines Corp.* Under IGRA, when a court rules that a state has failed to negotiate in good faith, the Secretary of the Interior eventually may prescribe "procedures [for class III

gaming] . . . which are consistent with the proposed compact selected by the mediator . . . , the provisions of [IGRA], and the relevant provisions of the laws of the state." 25 U.S.C. § 2710(7)(B)(vii). The Secretary cannot in any way, however, modify the determination of the court that a state has failed to negotiate in good faith. IGRA does not permit or condone revisionary authority by either the executive or legislative branches. The judicial decision is the last word by the judicial branch regarding the IGRA case or controversy. *Compare Plaut,* 115 S.Ct. at 1457 ("Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.") (emphasis in original).

Consistent with article III, Congress may provide a partial judicial remedy, even if that remedy permits additional government action. As long as the judgment of the court is not itself to be modified by later executive or administrative orders, the court's decision need not be the last word in the ultimate resolution of a larger issue. To paraphrase *ICC v. Brimson:*

> If it be adjudged that the [Respondents] are, in law, obliged to do what they have refused to do [negotiate in good faith], that determination will not be merely ancillary and advisory, but in the words of *Sanborn's Case,* will be a "final and undisputable basis of action," as between the [Tribe and the Secretary of the Interior and the State] and will furnish a precedent in all similar cases. . . . It is nonetheless the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the

> customary forms of judicial proceedings, because its effect may be to aid an administrative or executive body in the performance of duties legally imposed upon it by Congress in execution of a power granted by the Constitution.

154 U.S. at 487. Thus, the fact that the Secretary of the Interior may later depend on the court's determination of the scope of state-permitted gaming and the state's good faith or lack thereof, does not make those judicial determinations inconsistent with article III power. The Tribal lawsuit sought to provide the legal foundation for the compact. The good faith/scope of gaming judgment authorized by IGRA performs that article III function by deciding whether the State has discharged its federal duty to negotiate in good faith.

CONCLUSION

The decision below should be reversed either because the Indian Commerce Clause provides Congress with the power to abrogate Eleventh Amendment immunity to allow Indian tribes' suits for prospective, non-monetary relief, or because *Ex parte Young* permits such suits against the state officers discharging the federal duties created by IGRA.

Respectfully submitted,

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SEMINOLE TRIBE OF FLORIDA, PETITIONER

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act, 25 U.S.C. 2710 (d)(7)(A)(i), provides federal courts with jurisdiction over claims by Indian Tribes that States have failed to negotiate gaming compacts in good faith. The questions presented are:

1. Whether *Ex parte Young*, 209 U.S. 123 (1908), permits a suit against the Governor of a State arising from the State's failure to negotiate (through the Governor) an Indian gaming compact in good faith.

2. Whether Congress has authority under the Constitution to abrogate a State's immunity from a suit by a Tribe for declaratory and ancillary injunctive relief arising from the State's failure to negotiate in good faith.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-12

SEMINOLE TRIBE OF FLORIDA, PETITIONER

v.

STATE OF FLORIDA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case involves a challenge to the constitutionality of a section of the Indian Gaming Regulatory Act (IGRA) that provides for suits in federal court by an Indian Tribe arising from the failure by a State to negotiate in good faith concerning a tribal-state compact governing certain gaming on Indian land. See 25 U.S.C. 2710(d)(7)(A)(i). The Secretary of the Interior has substantial responsibilities under IGRA, including the authority to approve all tribal-state gaming compacts, to disapprove them in certain circumstances, and to prescribe gaming regulations when a Tribe and a State are unable to conclude a compact. 25 U.S.C. 2710(d)(7)(B)(vii), 2710(d)(8). In response to this

Court's invitation, the Solicitor General filed a brief at the petition stage expressing the views of the United States.

STATEMENT

1. In 1987, this Court held that neither Public Law 280 (Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified as amended at 18 U.S.C. 1162 and 28 U.S.C. 1360) nor the Organized Crime Control Act of 1970 (18 U.S.C. 1955) authorized California to enforce its gaming laws against Indian Tribes operating bingo and poker games on their reservations, because the relevant state gaming laws were "civil/regulatory" rather than "criminal/prohibitory" in nature. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). That decision left much Indian gaming unregulated by the States. Pet. App. 3a.[1] At the same time, federal law did not provide "clear standards or regulations for the conduct of gaming on Indian lands." 25 U.S.C. 2701(3). In an attempt to fill that void, Congress in 1988 enacted the Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. 2701 *et seq*.

IGRA's purpose is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. 2702(1). Congress simultaneously sought to "shield [Indian gaming] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. 2702(2). To fulfill those

[1] See also 25 U.S.C. 2701(5) (finding that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.").

purposes, IGRA divides gaming into three classes, each of which is regulated differently.

Class I gaming, over which Indian Tribes exercise exclusive regulatory control, consists of social games for prizes of minimal value and traditional games engaged in as part of tribal ceremonies. 25 U.S.C. 2703(6), 2710(a)(1). Class II gaming consists of bingo, other games similar to bingo (when played in the same location), and non-banking card games. 25 U.S.C. 2703(7). Indian Tribes maintain regulatory jurisdiction over class II gaming, see 25 U.S.C. 2710(a)(2), subject to the supervision of the National Indian Gaming Commission (an entity within the Department of the Interior). 25 U.S.C. 2704. An Indian Tribe may engage in class II gaming if: (1) the State in which the gaming is located "permits such gaming for any purpose by any person, organization or entity," (2) such gaming is not prohibited on Indian lands by federal law, and (3) the gaming is conducted pursuant to a tribal ordinance that satisfies specified statutory requirements and is approved by the Chairman of the Commission. 25 U.S.C. 2710(b).

Class III gaming, at issue here, is gaming that does not fall within class I or class II, and includes banking card games, casino games, slot machines, horse racing, dog racing, jai alai, and lotteries. 25 U.S.C. 2703(8); 25 C.F.R. 502.4. Class III gaming is lawful only if it is located in a State that permits such gaming, is authorized by a tribal ordinance that satisfies the requirements for a class II ordinance, and is "conducted in conformance with a Tribal-State compact." 25 U.S.C. 2710(d)(1). A tribal-state compact may address such matters as standards for the conduct of the gaming, the application of state or tribal criminal and civil laws, assessments to defray the costs of state regulation, taxation by the Tribe, and remedies for breach of contract. 25 U.S.C. 2710(d)(3)(C). The Secretary of the Interior is authorized to approve any tribal-state

compact and may disapprove such a compact only if it violates IGRA, any other provision of federal law, or the trust obligations of the United States to Indians. 25 U.S.C. 2710(d)(8).

To facilitate the formation of a tribal-state compact, IGRA provides that, upon request by the Tribe, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. 2710(d)(3)(A). Congress also provided for judicial consideration of a Tribe's allegation that a State has failed to fulfill that responsibility. Specifically, "[t]he United States district courts shall have jurisdiction over * * * any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact [regulating class III gaming] * * * or to conduct such negotiations in good faith." 25 U.S.C. 2710(d)(7)(A)(i). In such a suit, the Tribe must initially introduce evidence that a tribal-state compact has not been concluded and that the State did not respond to the Tribe's request to negotiate or did not respond in good faith. 25 U.S.C. 2710(d)(7)(B)(ii). Once such evidence is introduced, "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith." *Ibid.* In determining whether a State has negotiated in good faith, the district court may consider such factors as the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming. 25 U.S.C. 2710(d)(7)(B)(iii)(I). A State's demand for taxing authority is evidence of bad faith. 25 U.S.C. 2710(d)(7)(B)(iii)(II).

If the district court finds that the State has failed to negotiate in good faith, "the court shall order the State and the Indian tribe to conclude such a compact within a 60-day period." 25 U.S.C. 2710(d)(7)(B)(iii). If they do not

do so, the Tribe and the State each must submit to a mediator appointed by the district court a proposed compact that represents "their last best offer." 25 U.S.C. 2710(d)(7)(B)(iv). The mediator then must select the compact "which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court." *Ibid.* Once the mediator submits the selected compact to the State and the Tribe, the State has 60 days in which to consent to that compact. 25 U.S.C. 2710(d)(7)(B)(v) and (vi).

If the State consents to the compact selected by the mediator, it is treated as a tribal-state compact entered into by agreement. 25 U.S.C. 2710(d)(7)(B)(vi). If the State does not consent, "the mediator shall notify the Secretary [of the Interior] and the Secretary shall prescribe, in consultation with the Indian tribe, procedures [for class III gaming] * * * which are consistent with the proposed compact selected by the mediator * * *, the provisions of [IGRA], and the relevant provisions of the laws of the State." 25 U.S.C. 2710(d)(7)(B)(vii).

2. In January 1991, the Seminole Tribe of Florida wrote to the Governor of Florida requesting the State to commence negotiations for a compact governing class III gaming operations proposed by the Tribe. Pet. App. 44a. The State was willing to negotiate concerning the forms of class III gaming specifically permitted by state law: card games, raffles, and pari-mutuel wagering on dog racing, horse racing, and jai alai. The State refused, however, to negotiate over forms of gaming prohibited by state law, such as casino gambling. For that reason, negotiations broke down. *Id.* at 45a-46a.

In December 1991, the Tribe filed suit in the United States District Court for the Southern District of Florida against the State and its Governor, alleging that they had failed to conduct good faith negotiations as required by

IGRA. J.A. 18a. The Tribe specifically alleged that by refusing to negotiate concerning casino gambling, the State had breached its duty under IGRA to negotiate concerning "such gaming" as the State "permits * * * for any purpose by any person, organization or entity." 25 U.S.C. 2710(d)(1)(B). The Tribe asserted that the phrase "such gaming" should be interpreted generically rather than in a game-specific way, so that the State's allowance of some forms of class III gaming required the State to negotiate concerning all forms of class III gaming, including casino gambling. Pet. App. 54a-55a. The Tribe also asserted that Florida "permits" casino gambling because it fails to enforce its gaming laws against charities that hold casino nights. *Id.* at 61a. The Tribe sought a declaratory judgment that IGRA requires the State to negotiate concerning casino gambling; an order requiring the State, acting through the Governor, to conclude a tribal-state compact within 60 days; and appointment of a mediator to resolve any impasse. J.A. 18a-19a.

The State and the Governor filed a motion to dismiss the complaint on the ground that the Eleventh Amendment barred the Tribe's suit. Pet. App. 26a, 28a. The district court denied the motion to dismiss. It held that "Congress did in fact abrogate the States' immunity when it enacted IGRA" and that "pursuant to the Indian Commerce Clause, Congress plainly had the constitutional power to abrogate." *Id.* at 30a.

3. The court of appeals reversed the district court's order denying the motion to dismiss. Pet. App. 1a-25a. The court agreed with the district court that "Congress intended to abrogate the states' sovereign immunity," reasoning that "unless Congress intended to abrogate the states' immunity," IGRA's grant of jurisdiction over

claims that a State has not negotiated in good faith "would be of no effect." *Id.* at 14a-15a.

The court of appeals went on to hold, however, that Congress lacks power under the Indian Commerce Clause of the Constitution (Art. I, § 8, Cl. 3) to abrogate a State's immunity from suit. The court acknowledged that *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), held that Congress has the power under the Interstate Commerce Clause to abrogate a State's immunity from suit. Pet. App. 18a-20a. The court concluded, however, that *Union Gas* was distinguishable for two reasons. *Id.* at 20a-22a.

First, the court noted that although Congress's "plenary powers under the Interstate Commerce Clause * * * allow Congress to place limits on the states in order to 'maintain[] free trade among the States[,]' * * * 'the central function of the Indian commerce clause is to provide Congress with plenary power to legislate in the field of Indian affairs.'" Pet. App. 21a (quoting *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989)). For that reason, the court concluded, "the unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* cannot be extended to the Indian Commerce Clause." Pet. App. 21a. Second, the court of appeals observed that "the Court has allowed federal jurisdiction over states only when the states partake in an activity typical of private individuals." *Id.* at 22a. Viewing the negotiations contemplated by IGRA as within "the typical realm of state authority," the court concluded that "the principles of federalism and sovereign immunity exemplified in the Eleventh Amendment prevent Congress from abrogating the states' immunity." *Ibid.*

The court of appeals next held that *Ex parte Young*, 209 U.S. 123 (1908), does not permit a suit against the Governor of a State to require good faith negotiations

under IGRA. The court believed that, under IGRA, a State has discretion over the terms of a compact as well as the decision whether to negotiate, and that the *Ex parte Young* doctrine "cannot be used to compel an executive official to undertake a discretionary task." Pet. App. 23a-24a. The court also concluded that *Ex parte Young* was inapplicable because the Tribe's suit "is, in reality, against the state." Pet. App. 23a, 24a. The court explained that IGRA "uniformly addresses itself to 'the State'; not once does it impose duties or responsibilities on a particular officer of the state (e.g., the governor, the legislature, etc.)." *Id.* at 24a. The court therefore remanded with directions to dismiss the suit. *Id.* at 25a.[2]

SUMMARY OF ARGUMENT

A. The Tribe's suit against the Governor is permissible under *Ex parte Young*, 209 U.S. 123 (1908). In *Ex parte Young*, the Court held that a federal court could award prospective relief to require a state official to comply with federal law. The Court has repeatedly reaffirmed that holding. In this case, the Tribe alleged that the Governor has failed to negotiate a gaming compact in good faith as

[2] While the appeal from the order denying the motion to dismiss the complaint was pending in the court of appeals, the district court rejected the Tribe's claims on the merits and entered final judgment in favor of the State and its Governor. Pet. App. 43a-83a. The district court held that IGRA's duty to negotiate is game-specific, and that the State's operation of a lottery and its allowance of pari-mutuel wagering therefore did not require the State to bargain concerning casino gambling. *Id.* at 55a-58a. The court also held that the exercise of prosecutorial discretion not to enforce gaming laws against charities that hold casino nights does not mean that the State "permits" such gaming within the meaning of IGRA. *Id.* at 69a-75a. The Seminole Tribe has appealed that judgment, but that appeal has been stayed pending the decision by this Court on the Eleventh Amendment issue. Pet. App. 84a.

required by the Indian Gaming Regulatory Act (IGRA), and it sought declaratory and injunctive relief to require the Governor to comply with that obligation. If a federal court were to agree that the Governor had failed to negotiate in good faith as required by federal law, an award of declaratory relief to that effect and an order requiring the Governor to participate in IGRA's narrowly tailored remedial procedures would reflect a straightforward application of *Ex parte Young*.

The court of appeals failed to rely on *Ex parte Young* on the ground that its rationale cannot be invoked to compel a discretionary act. Under IGRA, however, once a Tribe requests a State to negotiate, "the State *shall* negotiate with the Indian tribe in good faith." 25 U.S.C. 2710(d)(3)(A) (emphasis added). That language creates a mandatory duty to negotiate in good faith.

The court also concluded that *Ex parte Young* was inapplicable because the Tribe's suit is really against the State. But the Tribe named the Governor as a defendant and has sought relief against him. And while the State is the real party in interest, that is true in all *Ex parte Young* suits. Because a State can only negotiate through its officials, the obligation under IGRA to negotiate must be understood to fall upon the state officials who have authority under state law to negotiate. In this case, the Governor has such authority. Accordingly, under *Ex parte Young*, a suit for prospective relief may be brought against the Governor if he has not complied with his obligation to negotiate in good faith.

B. The Tribe's suit against the State is not precluded by the Eleventh Amendment because Congress constitutionally abrogated the State's immunity from suit. In *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), the Court held that Congress has the power under the Interstate Commerce Clause to authorize federal courts

to award monetary relief against the States. Congress's power to regulate Indian commerce is rooted in the same Clause as its power to regulate interstate commerce, and it is at least as broad in scope. Congress therefore also has the power under the Indian Commerce Clause to abrogate a State's immunity from suit.

The IGRA provision at issue here stands on an even firmer constitutional footing than the provision at issue in *Union Gas*. First, Congress's powers are augmented in this context by its special responsibility and authority with respect to the Indian Tribes. Second, IGRA does not authorize monetary relief. Instead, it does no more than authorize the kind of relief against the State that *Ex parte Young* authorizes against a state official. Third, IGRA affords a cause of action only to Indian Tribes. Suits brought by another sovereign do not implicate the values underlying the Eleventh Amendment to the same extent as suits by individuals. Finally, the provision at issue here is part of a broader scheme that is designed in part to enhance the States' power to regulate Indian gaming. Congress believed that granting additional authority to the States would be inequitable to the Tribes, unless the Tribes could enforce the States' obligation to negotiate in good faith.

The court of appeals sought to distinguish *Union Gas* on the ground that Congress's power to regulate Indian commerce serves different purposes than does Congress's power to regulate interstate commerce. The critical point in *Union Gas*, however, was that the States ceded a portion of their sovereignty when they gave Congress plenary power to regulate interstate commerce. In adopting the Constitution, States also ceded whatever authority they had over Indian affairs.

The court of appeals also sought to limit *Union Gas* to activities that do not fall within the traditional sphere of

state authority. But the Court in *Union Gas* did not mention that factor in its analysis, and this Court has squarely rejected such an approach in the Tenth Amendment context. In any event, negotiating a compact with a Tribe is not a traditional state activity. Historically, States have reached agreements with Tribes under federal auspices, and IGRA is consistent with that tradition.

ARGUMENT

THE ELEVENTH AMENDMENT DOES NOT PRECLUDE A SUIT BY AN INDIAN TRIBE AGAINST A STATE OR ITS GOVERNOR UNDER THE INDIAN GAMING REGULATORY ACT ARISING FROM THE STATE'S FAILURE TO NEGOTIATE A GAMING COMPACT IN GOOD FAITH

The Indian Gaming Regulatory Act (IGRA) provides that "[t]he United States district courts shall have jurisdiction over * * * any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact [regulating class III gaming] * * * or to conduct such negotiations in good faith." 25 U.S.C. 2710(d)(7)(A)(i). Relying on that provision, the Seminole Tribe filed suit against the State of Florida and its Governor alleging that they had not engaged in good faith negotiations. The Tribe sought declaratory relief and an order directing the State, through its Governor, to enter into good faith negotiations. The court of appeals held that the Eleventh Amendment precludes the Tribe's suit. That holding is incorrect. The Tribe's suit against the Governor is permissible under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and its suit against the State is

permissible because Congress has authority to abrogate the State's immunity from suit by a Tribe under IGRA.

A. The Tribe's Suit Against The Governor Is Permissible Under *Ex Parte Young*

1. The Eleventh Amendment to the Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This Court has not interpreted the Eleventh Amendment in accordance with its literal terms. Instead, the Court has viewed the Amendment as confirmation of a broader principle: that States entered the Union with their immunity from suit intact, and the grant of judicial power in Article III to adjudicate claims against the States did not eliminate that immunity. See *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 779 (1991). Thus, notwithstanding the absence of a textual basis in the Eleventh Amendment, the Court has applied the principle that a State is immune from suit absent its consent in suits by citizens against their own State arising under federal law, *Hans* v. *Louisiana*, 134 U.S. 1 (1890), and in suits brought by sovereigns like Indian Tribes and foreign nations. *Blatchford*, *supra*; *Principality of Monaco* v. *Mississippi*, 292 U.S. 313 (1934).

When a suit is brought against a state official, a question arises whether it should be treated as a suit against the State itself. The general rule is that a suit against a state official must be treated as a suit against a State when the State is the real party in interest, *i.e.*, when the relief would operate against the State.

Pennhurst State School & Hosp. v. *Halderman*, 465 U.S. 89, 107, 109 n.17 (1984). An important exception to that rule is that sovereign immunity does not preclude a suit against a state official to secure compliance with federal law. That exception was first announced in *Ex parte Young*, 209 U.S. 123 (1908). There, the Court held that a federal court could enjoin a state Attorney General from enforcing an unconstitutional state statute. The theory of *Ex parte Young* was that an unconstitutional statute is void and therefore cannot immunize a state official from suit. *Id.* at 159-160. Because the State could not authorize the action, the officer was "stripped of his official or representative character and [was] subjected in his person to the consequences of his individual conduct." *Id.* at 160.

In *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974), the Court declined to extend the holding of *Ex parte Young* to suits for retroactive monetary relief. The Court reaffirmed in *Edelman*, however, that a federal court may enter an injunction that governs an official's future conduct. *Id.* at 667-668. Since *Edelman*, the Court has continued to maintain that distinction: prospective relief to secure future compliance with federal law is permissible, while retroactive monetary relief to remedy past wrongs is not. See, *e.g.*, *Puerto Rico* v. *Branstad*, 483 U.S. 219, 227-228 (1987); *Papasan* v. *Allain*, 478 U.S. 265, 276-279 (1986); *Green* v. *Mansour*, 474 U.S. 64, 68 (1985); *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979); *Milliken* v. *Bradley*, 433 U.S. 267, 289 (1977). The rationale for that approach is that while both prospective and retroactive relief implicate Eleventh Amendment concerns, prospective relief is necessary to give life to the Supremacy Clause. *Green*, 474 U.S. at 68. Thus, "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Ibid.* On the other hand, "com-

pensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Ibid.*

2. The Tribe's suit against the Governor fits squarely within the rationale of *Ex parte Young*. The Tribe has alleged that the Governor has failed to negotiate in good faith as required by IGRA, and the Tribe has sought declaratory and injunctive relief to require the Governor to comply with that obligation. J.A. 18a-19a. Resolution of the Tribe's claim on the merits turns entirely on an issue of statutory construction. IGRA requires a State to bargain over "such gaming" as the State "permits" * * * for any purpose by any person, organization, or entity." 25 U.S.C. 2710(d)(1)(B). The Tribe contends that the phrase "such gaming" should be construed generically rather than in a game-specific way, so that Florida's operation of a lottery, which is a class III game, requires the Governor to bargain over all forms of class III gaming, including casino gambling. Pet. App. 54a-55a.[3] The Tribe also contends that Florida "permits" casino gambling within

[3] Other suits by a Tribe against a State under IGRA have also involved a legal issue concerning the proper construction of IGRA's requirement that the State negotiate about "such gaming" as state law "permits." *E.g.*, *Rumsey Indian Rancheria of Wintun Indians* v. *Wilson*, 41 F.3d 421, 425-426 (9th Cir. 1994); *Cheyenne River Sioux Tribe* v. *South Dakota*, 3 F.3d 273, 278-279 (8th Cir. 1993); *Mashantucket Pequot Tribe* v. *Connecticut*, 913 F.2d 1024, 1029 (2d Cir. 1990), cert. denied, 499 U.S. 975 (1991); *Sault Ste. Marie Tribe of Chippewa Indians* v. *Michigan*, 800 F. Supp. 1484, 1486 (W.D. Mich. 1992), appeal dismissed, 5 F.3d 147 (6th Cir. 1993); *Yavapai-Prescott Indian Tribe* v. *Arizona*, 796 F. Supp. 1292, 1294, 1296 (D. Ariz. 1992); *Lac du Flambeau Band of Lake Superior Chippewa Indians* v. *Wisconsin*, 770 F. Supp. 480, 484-488 (W.D. Wis. 1991), appeal dismissed, 957 F.2d 515 (7th Cir.), cert. denied, 113 S. Ct. 91 (1992). The courts of appeals that have squarely addressed the issue have agreed with the game-specific position of Florida in this case. *Rumsey*, 41 F.3d at 425-426; *Cheyenne River Sioux Tribe*, 3 F.3d at 278-279.

the meaning of IGRA because it fails to enforce its gaming laws against charities that hold casino nights. *Id.* at 61a. If a federal court were to agree with the Tribe's interpretation of IGRA, a declaratory judgment to that effect and an order requiring the Governor to negotiate on the basis of such a legal interpretation would reflect a straightforward application of *Ex parte Young*.[4]

3. The court of appeals nevertheless concluded that *Ex parte Young* is inapplicable here. In the court's view, *Ex parte Young* does not apply if a suit seeks "to compel an executive official to undertake a discretionary task" or if the suit "is, in reality, against the state." Pet. App. 23a. The Tribe's suit, the court concluded, "fit[s] into both categories." *Ibid.* That reasoning is unpersuasive.

a. The court of appeals concluded that the relief sought in this case would require the Governor to perform a discretionary act because IGRA permits the State to exercise discretion in proposing the terms of any tribal-state compact. Pet. App. 23a. IGRA limits the State's discretion, however, in one significant respect. Once a Tribe requests a State to negotiate, "the State *shall* negotiate with the Indian tribe in good faith." 25 U.S.C. 2710(d)(3)(A) (emphasis added). That statutory language

[4] In many instances, it might not be necessary for a district court to go beyond an award of declaratory relief, especially where the basis of the dispute between the State and the Tribe concerns an interpretation of IGRA itself. If (as in this case), the district court agrees with the State's interpretation of IGRA that underlies its failure to negotiate about particular games, the court would have no occasion to order the State (or its Governor) to negotiate. On the other hand, if the court agrees with the Tribe's interpretation of IGRA, the Governor might then agree to negotiate under IGRA as so construed, without any need for a judicial order directing him to do so. Such declaratory relief against a Governor regarding the scope of IGRA would be particularly far removed from the concerns that underlie the Eleventh Amendment.

creates a mandatory duty to negotiate in good faith. A State's refusal to fulfill that duty is a violation of federal law. Thus, although a federal court has no authority to interfere with the State's discretion to propose or agree to particular terms of a compact, it may, under *Ex parte Young*, order the Governor to negotiate in good faith. Such an order does not interfere with the Governor's discretion, because the Governor has no discretion under IGRA to negotiate other than in good faith. See *Ex parte Young*, 209 U.S. at 159 ("An injunction to prevent [a state officer] from doing that which he has no legal right to do is not an interference with the discretion of [that] officer."); cf. *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 487-488 (1960) (obligation under Section 8(d) of National Labor Relations Act, 29 U.S.C. 158(d), to "confer in good faith" creates mandatory "duty" to bargain).

As the court of appeals noted (Pet. App. 23a), IGRA prescribes remedial procedures if the district court finds that the Governor has failed to negotiate (or to do so in good faith). The first step is for the court to order the State and the Tribe to conclude a compact within a 60-day period. 25 U.S.C. 2710(d)(7)(B)(iii). If they fail to do so, a mediator appointed by the court is authorized to choose between proposals submitted by the Tribe and the State; if the State submits no proposal, the mediator presumably would choose the Tribe's proposal by default. 25 U.S.C. 2710(d)(7) (B)(iv). Finally, if the State refuses to consent to the mediator's choice, the Secretary has authority to prescribe rules governing class III gaming on the Tribe's lands, subject to conditions prescribed by IGRA. See 25 U.S.C. 2710(d)(7)(B)(vii). Contrary to the court of appeals' view (Pet. App. 23a), the existence of those back-up remedial procedures does not mean that the decision whether to negotiate in the first instance is discretionary. Moreover, a Governor's refusal to participate in IGRA's

remedial procedures would have substantial consequences for the State, because the State would thereby lose its statutory right and practical ability under IGRA to shape the scope of gaming that will be permitted.

The federal duty under IGRA to negotiate about gaming is thus best understood as a conditional one: If the State wishes to preserve its opportunity to shape the scope of gaming, it must negotiate with the Tribe in good faith concerning a compact. Nothing in *Ex parte Young* precludes a federal court from ascertaining whether a Governor has complied with such a conditional duty and from invoking IGRA's narrowly tailored remedial procedures if the Governor has not done so. Indeed, such relief is far less intrusive on state prerogatives—and therefore poses far less of a threat to the values underlying the Eleventh Amendment—than relief granted in suits under *Ex parte Young* to enforce substantive and continuing legal obligations imposed on state officials under federal laws.

Duties imposed under the Spending Clause provide a useful analogy. A State is obliged to fulfill federal statutory requirements enacted pursuant to the Spending Clause only if the State opts to receive federal money. Accordingly, a State willing to forgo receipt of federal money can avoid complying with the federal requirements. The conditional nature of the State's duty, however, does not serve as a barrier to the award of prospective relief under *Ex parte Young* in Spending Clause cases so long as the State continues to receive funding. See *Quern*, 440 U.S. at 346-349 (approving prospective relief under *Ex parte Young* in Spending Clause case). There likewise is no reason why the conditional nature of the duty should serve as a barrier under IGRA.

b. The court of appeals' view (Pet. App. 24a) that *Ex parte Young* is inapplicable because the Tribe's suit is

really against the State is also without merit. The Tribe named the Governor as a defendant and sought relief against him. And while the State is the real party in interest, that is true in all *Ex parte Young* suits. *Pennhurst*, 465 U.S. at 107-109 & n.17; see also *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). The whole point of *Ex parte Young* is that relief nevertheless may be ordered against a state official to comply with federal law. As explained in *Pennhurst*, if a suit seeks prospective relief against a state official to vindicate federal law, it is permitted under *Ex parte Young*, "notwithstanding the obvious impact on the State itself." 465 U.S. at 104.

As the court of appeals noted, IGRA, by its terms, imposes obligations on the State, and not on any particular state official. Pet. App. 24a. States, however, can act only through their officials. See *Pennhurst*, 465 U.S. at 114 n.25. The obligations that IGRA places on the States therefore must be understood to fall not only upon the States but also upon those officials vested with authority under state law to negotiate on behalf of the States.

In that respect, IGRA is similar to the Fourteenth Amendment, which imposes duties directly upon the States and does not specifically refer to state officials. This Court long ago held that the duties of the Fourteenth Amendment nonetheless fall upon state officials as well. As the Court explained in *Home Tel. & Tel. Co.* v. *City of Los Angeles*, 227 U.S. 278, 286 (1913), "the provisions of the [Fourteenth] Amendment * * * are addressed, of course, to the States, but also to every person whether natural or juridical who is the repository of state power." See also *Pennhurst*, 465 U.S. at 105 ("an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment").

In this case, there is no dispute that the Governor is the state official vested with authority under the constitution and laws of Florida to negotiate on behalf of the State with the Seminole Tribe. The duty that IGRA imposes on the State to negotiate in good faith therefore falls upon the Governor. A determination by a federal court that the Governor has failed to fulfill that federal obligation, thereby triggering the remedial provisions of IGRA, is permissible under *Ex parte Young*.[5]

---

[5] Should this Court hold that judicial relief focused on the alleged failure by the Governor to negotiate in good faith is permissible under *Ex parte Young*, there may be no need to resolve the question whether Congress may abrogate the immunity of the State itself in this setting. A judicial determination that the Governor has failed to negotiate in good faith on behalf of the State—and a resulting order directed to the Governor under IGRA's special remedial procedures of further negotiation, mediation, and (if necessary) the promulgation of rules by the Secretary—would presumably provide complete relief to the Tribe. Thus, if this Court makes clear that a suit against the Governor is permissible under *Ex parte Young*, the Tribe might be willing to forgo seeking relief directly against the State, and the Court (or the courts below on remand) might in any event conclude that relief against the State should be denied as a matter of equitable discretion. Accordingly, if the Court concludes that a suit against the Governor is permissible under *Ex parte Young*, it may be appropriate to reverse the judgment of the court of appeals on that basis alone, without reaching the question whether the Eleventh Amendment forecloses Congress from providing for a suit for prospective relief against the State itself.

B. Congress Has The Power Under The Constitution To Provide For A Suit By An Indian Tribe Against A State For Prospective Relief Arising From The State's Failure To Negotiate In Good Faith

Congress may abrogate a State's immunity from suit "only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985). Congress did that here. IGRA provides that a federal court shall have jurisdiction over any cause of action arising from "the failure of a State to enter into negotiations with the Indian tribe." 25 U.S.C. 2710(d)(7)(A)(i). IGRA further provides that once the Tribe introduces evidence that the State has not negotiated in good faith, "the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith." 25 U.S.C. 2710(d)(7)(B)(ii). Finally, IGRA provides that if "the court finds that the State has failed to negotiate in good faith * * *, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period." 25 U.S.C. 2710(d)(7)(b)(iii). Those repeated textual references to the State are sufficient to show that Congress clearly intended to abrogate the State's immunity from suit.

The court of appeals agreed that Congress had clearly expressed its intent to abrogate the State's immunity from suit. Pet. App. 14a-15a. It held, however, that Congress lacked authority to effect such a waiver. *Id.* at 15a-22a. That holding is incorrect.

1. In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), this Court held for the first time that Congress possesses power in some circumstances to abrogate a State's immunity from suit. At issue in *Fitzpatrick* was the constitutionality of Congress's grant of jurisdiction to federal courts to award retroactive monetary relief against States that discriminate in their employment

practices in violation of Title VII of the Civil Rights Act of 1964. 427 U.S. at 447-448. This Court held that Congress has the power under Section 5 of the Fourteenth Amendment to authorize federal courts to award such relief against the States. The Court explained that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority." 427 U.S. at 456.

In *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), the Court rejected an Eleventh Amendment challenge to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, which subjects States to liability for the clean-up costs of hazardous waste sites they have contaminated. The Court held that Congress has the power under the Interstate Commerce Clause to authorize federal courts to award such relief against the States. A plurality of the Court reasoned that, "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States." 491 U.S. at 16. "It cannot be relevant," the plurality continued, "that the Fourteenth Amendment accomplishes this exchange in two steps (§§ 1-4, plus § 5), while the Commerce Clause does it in one." *Id.* at 16-17. According to the plurality, "[t]he important point * * * is that the provision both expands federal power and contracts state power; that is the meaning, in fact, of a 'plenary' grant of authority." *Id.* at 17. Because the States ceded plenary power over interstate commerce to Congress, the plurality concluded, the States also "relinquished their immunity where

Congress found it necessary, in exercising this authority, to render them liable." *Id.* at 19-20.[6]

2. It follows *a fortiori* from *Union Gas* that Congress may provide for a suit by an Indian Tribe against a State. The United States' power over Indian affairs derives from the Indian Commerce Clause (a component of Art. I, § 8, Cl. 3), the Clauses giving the President and the Senate exclusive power to make treaties (Art. II, § 2, Cl. 2; Art. I, § 10, Cl. 1), and "from the necessity of giving uniform protection to a dependent people." *Williams* v. *Lee*, 358 U.S. 217, 219 n.4 (1959) (citing *United States* v. *Kagama*, 118 U.S. 375 (1886)). Congress's power to regulate Indian commerce is rooted in the same Clause as its power to regulate interstate commerce. And like the interstate component of that Clause, the Indian component is a plenary grant of authority. *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989). Accordingly, Congress's power to provide for suits against States under the Indian Commerce Clause "cannot be less than its authority [to do so] under the Interstate Commerce Clause." *Spokane Tribe of Indians* v. *Washington*, 28 F.3d 991, 997 (9th Cir. 1994).

The background and history of the Indian component of the Commerce Clause confirm that Congress's power under that component is at least as broad as its power under the Interstate component. One of the key deficiencies of the Articles of Confederation was that they divided authority over Indian affairs between the States and the

[6] Justice White expressed his agreement with the conclusion reached by the plurality "that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States," but stated that he "d[id] not agree with much of [the plurality's] reasoning." 491 U.S. at 57 (White, J., concurring in the judgment in part and dissenting in part). Justice White did not offer any additional reasoning.

central government. Article IX of the Articles of Confederation provided that "[t]he United States in Congress assembled" shall have the "sole and exclusive right" of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." James Madison viewed that attempted division of sovereign authority as an "endeavor[] to accomplish impossibilities," because it sought "to reconcile a partial sovereignty in the Union, with complete sovereignty in the States." *The Federalist* No. 42, at 268-269 (C. Rossiter ed. 1961). Georgia and North Carolina relied upon the proviso giving States authority within their own limits to treat with Indians regarding their land and other matters. The effect of that construction of the proviso was "to annul the power itself." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). That construction of the proviso also created the potential for individual States to undermine the States' collective commitments to the Indians and the security of the United States.

In response to those difficulties, the States, in the Constitution, ceded to the United States all authority to manage affairs with the Indian Tribes. Accordingly, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (*Oneida II*); see also *Worcester*, 31 U.S. (6 Pet.) at 561 ("The whole intercourse between the United States and this [Indian] nation, is, by our constitution and laws, vested in the government of the United States.").

Thus, the Indian Commerce Clause, perhaps even more than the Interstate Commerce Clause, grants broad power to Congress over a specified domain of public affairs and simultaneously takes power away from the States. It

follows that under *Union Gas*, the authority of Congress to abrogate state sovereignty under the former Clause, as under the latter, is rooted in the plan of the Constitutional Convention. See 491 U.S. at 19-20.

3. Several considerations support the conclusion that the provision for suits by Tribes against States under IGRA stands on even firmer constitutional footing than the provision at issue in *Union Gas*. First, Congress's power over Indian affairs does not stem from the Commerce Clause alone. It stems as well from the historical recognition that the Indian Tribes, though sovereign, "*are* the wards of the nation," and that from "the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." *Kagama*, 118 U.S. at 383-384. The United States (on behalf of all the States) has a special responsibility to the Tribes to further their economic well-being and amicable dealings with the States. That special responsibility reinforces the authority of Congress to provide for a Tribe, as a dependent sovereign, to bring an action against a State arising out of the State's failure to negotiate in good faith with the Tribe about a compact governing gaming on the Tribe's land—a matter frequently of central importance to the Tribe and its members.

Second, there is an important difference in the scope of relief authorized under the statute at issue in *Union Gas* and that authorized under IGRA. The provision at issue in *Union Gas* subjected the States to suit for money damages. In contrast, a suit under IGRA cannot result in the imposition of monetary relief; only prospective relief is authorized. This Court recently identified protection of state treasuries from federal court decrees as both "the impetus for the Eleventh Amendment" and "the most important consideration in resolving an Eleventh

Amendment immunity issue." *Hess* v. *Port Authority Trans-Hudson Corp.*, 115 S. Ct. 394, 404, 406 (1994) (internal quotation marks omitted). Thus, IGRA does not threaten the core value underlying the Eleventh Amendment.

Moreover, the effect of IGRA is simply to authorize a suit against a State in circumstances in which *Ex parte Young* would authorize a suit against a state official. Whatever the precise scope of Congress's power to abrogate a State's immunity from suit, it must include at least that much. After all, the State is already the real party in interest in an *Ex parte Young* suit. *Pennhurst*, 465 U.S. at 101-102, 104. The notion that an *Ex parte Young* suit is not against the State is a legal "fiction." *Id.* at 105. There is no constitutional impediment to Congress's dispensing with that legal fiction and authorizing what would otherwise be an *Ex parte Young* suit against the State in its own name.

That is particularly true given the limited nature of the relief authorized by IGRA. While IGRA provides for a court to order a State and a Tribe to conclude a compact within 60 days as a remedy for the State's failure to negotiate in good faith, there is no indication that the State's failure to agree to a compact (or even to participate in negotiations) during that period was intended to expose the State to any more intrusive order or to contempt. Compare *Alabama* v. *Pugh*, 438 U.S. 781, 782 (1978) (per curiam). Instead, as already noted, should the State decide not to participate in the remedial process of negotiation and mediation, the statutorily specified consequence is that the Secretary of the Interior will ultimately determine the scope of gaming on the Tribe's lands, taking into account the compact that is proposed by the Tribe (and presumably recommended by the mediator).

Yet another difference between *Union Gas* and this case is that the statutory provision upheld in that case grants a cause of action against the State to any individual, while the provision at issue here affords a cause of action only to Indian Tribes. Indian Tribes are sovereigns, *Blatchford*, 501 U.S. at 780, and a suit by a sovereign against a State does not implicate a State's dignity to the same extent as a suit by an individual against a State. See *Hess*, 115 S. Ct. at 400, 406 (one purpose of the Eleventh Amendment is to protect a State's integrity and dignity). There is also considerable historical evidence that the primary purpose of sovereign immunity was to protect States from suits brought by individuals rather than sovereigns. *Blatchford*, 501 U.S. at 780 n.1.

It is true that the Court held in *Monaco* that the Eleventh Amendment applies in a suit brought by a foreign nation against a State. And the Court similarly held in *Blatchford* that the Eleventh Amendment applies in a suit brought by a Tribe. But neither case involved the power of Congress to authorize a suit by another sovereign. The "plan of the convention," *Monoco*, 292 U.S. at 322-323, would provide Congress a firm basis for authorizing a foreign government to sue a State in federal court if it determined that such action was necessary to the conduct of foreign relations and commerce—*e.g.*, to conform the practice in suits involving foreign sovereigns to international norms. Compare *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-487 (1983) (Foreign Sovereign Immunities Act of 1976 codifies restrictive theory of foreign sovereign immunity that had been adopted by other nations). The parallel structure of the Commerce Clause—vesting in Congress the power to regulate Commerce "with foreign Nations" and "with the Indian Tribes"—indicates that the Framers contemplated bilateral relations between the United States and the

Indian Tribes as distinct sovereign entities, just as they contemplated such relations with foreign nations. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 153 & n.19 (1982); see also *Worcester*, 31 U.S. (6 Pet.) at 559. That parallel structure also reflects the fact that, just as it was important to the security of the United States to vest authority in the national government over relations with foreign governments, so too it was important to the security of the United States to vest authority in the national government over relations with the Indians. For those reasons, Congress should have no less authority to authorize Indian Tribes to sue the States than it would have to authorize such suits by foreign nations.

The rationale of *Monaco* and *Blatchford* is inapplicable in this context in any event. Those cases declined to find an abrogation of the State's immunity from suit implicit in the Constitution itself because the Constitution could not be understood to have waived either a foreign government's or a Tribe's immunity from a suit brought by a State. *Blatchford*, 501 U.S. at 781-782. The absence of "mutuality" made it inappropriate to treat the States as having waived their immunity from a suit brought by a foreign government or a Tribe. *Id.* at 782. Congress, however, does have the authority to subject foreign governments and Tribes to suits by States. If mutuality is to be preserved, Congress should also have the power to authorize suits by foreign governments and Tribes against States.

Finally, unlike the situation in *Union Gas*, the abrogation of sovereign immunity in IGRA is part of a broader statutory scheme that is designed in part to enhance state authority. The Senate Report accompanying IGRA explained the reasons for including a provision that would waive the State's immunity from suit as follows:

This section is the result of the Committee balancing the interests and rights of tribes to engage in gaming against the interests of States in regulating such gaming. Under this act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated. In contrast, States are not required to forgo any State governmental rights to engage in or regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact. Thus, given this unequal balance, the issue before the Committee was how best to encourage States to deal fairly with tribes as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a State if a compact is not negotiated and chose to apply the good faith standard as the legal barometer for the State's dealings with tribes in class III gaming negotiations.

S. Rep. No. 446, 100th Cong., 2d Sess. 14 (1988). The Constitution should not be interpreted to preclude such innovative solutions to what otherwise might be intractable problems.

4. The court of appeals acknowledged that *Union Gas* is the closest precedent for this case. But instead of viewing Congress's authority to provide for suits by Tribes against States as following *a fortiori* from *Union Gas*, the court sought to distinguish *Union Gas* on two grounds. Neither distinction is substantial.

First, the court noted that the Interstate Commerce Clause and the Indian Commerce Clause have different purposes: Whereas the Interstate Commerce Clause

allows Congress to place limits on the States to "'maintain[] free trade among the States[,]' * * * 'the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.'" Pet. App. 21a (quoting *Cotton Petroleum*, 490 U.S. at 192). Those different purposes, however, have no bearing on the question whether Congress has the power under the Constitution to abrogate a State's immunity from suit. The critical point in *Union Gas* was that the States had ceded a portion of their sovereignty when they gave Congress the power to regulate interstate commerce. As we have already explained, the States, in adopting the Constitution, also unequivocally ceded whatever authority they previously had to regulate Indian affairs.

The court of appeals also sought to limit *Union Gas* to situations in which a State engages in an activity "typical of private individuals" and "outside the typical realm of state authority." Pet. App. 22a. That limitation cannot be reconciled with this Court's decisions. In *Fitzpatrick*, the activity engaged in by the State—employing workers to carry out governmental functions—was within the traditional sphere of state authority. In rejecting the State's claim of immunity from suit in that case, the Court made clear that the nature of the State's activity was irrelevant to the constitutional inquiry. 427 U.S. at 452. The nature of the State's activity in *Union Gas*—owning a hazardous waste site—was not mentioned as a factor in the decision. In the Tenth Amendment context, this Court has rejected as "unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is * * * 'traditional.'" *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-547

(1985). A traditional governmental function test is no more appropriate in the Eleventh Amendment context.

In any event, the court of appeals erred in characterizing negotiations by a State with an Indian Tribe as within the traditional sphere of state authority. Pet. App. 22a. The Constitution assigns the power to make Treaties (including those with Indian Tribes) to the national government (Art. II, § 2, Cl. 2), and agreements by States with Tribes historically were accomplished under federal auspices. See, *e.g.*, *Oneida II*, 470 U.S. at 232-233. IGRA is consistent with that constitutional arrangement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,
v.
STATE OF FLORIDA, and LAWTON CHILES,
Governor of Florida,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE SPOKANE TRIBE OF INDIANS, SHAKOPEE MDEWAKANTON DAKOTA COMMUNITY, COQUILLE INDIAN TRIBE, SHOALWATER BAY INDIAN TRIBE, WINNEBAGO TRIBE OF NEBRASKA, YAKAMA INDIAN NATION, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, AND CONFEDERATED TRIBES OF THE COLVILLE RESERVATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

I.

Does the legislative history of the Indian Gaming Regulatory Act show the clear intention of Congress to permit tribes to engage in class III gaming for various purposes?

II.

If the Court should decide that the Eleventh Amendment bars tribal suits against states for failure to negotiate in good faith, can the Court fashion an appropriate remedy without striking down Indian Gaming Regulatory Act in its entirety?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-12

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

v.

STATE OF FLORIDA, and LAWTON CHILES,
Governor of Florida,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE SPOKANE TRIBE OF INDIANS, SHAKOPEE MDEWAKANTON DAKOTA COMMUNITY, COQUILLE INDIAN TRIBE, SHOALWATER BAY INDIAN TRIBE, WINNEBAGO TRIBE OF NEBRASKA, YAKAMA INDIAN NATION, CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, AND CONFEDERATED TRIBES OF THE COLVILLE RESERVATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTERESTS OF AMICI CURIAE

Amici are federally recognized Indian tribes that have a compelling and obvious interest in the regulation of gaming on Indian lands. The Eleventh Circuit's decision in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994) could prevent amici and all other tribes

from exercising their sovereign gaming rights codified by Congress in the Indian Gaming Regulatory Act. Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701-2721; 18 U.S.C. §§ 1166-1168) ("IGRA"). Amici support the Seminole Tribe in challenging the *Seminole* decision.

Amici are the Shakopee Mdewakanton Dakota Community, the Spokane Tribe of Indians, the Winnebago Tribe of Nebraska, the Yakama Indian Tribe, the Shoalwater Bay Tribe, the Coquille Tribe of Indians, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, and the Confederated Tribes of the Colville Reservation. All are federally recognized Indian tribes. The amici tribes represent the totality of circumstances that currently exists in Indian country, including tribes with successful class III operations pursuant to tribal-state compacts (the Shakopee Mdewakanton Dakota Community and the Winnebago Tribe of Nebraska), tribes in the initial stages of class III operations (the Coquille Tribe of Indians), tribes with challenged class III operations protected by interim injunctive relief (the Spokane Tribe of Indians) and district court decisions (Confederated Tribes of the Colville Reservation), tribes seeking their remedies under IGRA (Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Yakama Indian Tribe), and tribes that have had to abandon negotiations and class III gaming plans until the legal issue of IGRA's remedy is resolved (the Shoalwater Bay Tribe).

In passing IGRA, Congress fashioned a scheme for regulating class III gaming under which amici and all other federally recognized tribes must refrain from exercising their legal right to operate such gaming on tribal lands unless they enter into negotiated tribal-state compacts or pursue the remedial provisions of IGRA. To insure that inaction by states could not be used to impede tribal gaming rights, Congress provided tribes with a cause of action in federal courts to sue a state that refused to negotiate in good faith. Amici's interest in this case is that the Court requires states to carry out the Congressionally-mandated compromise that gives states the opportunity to have a significant role in the regulation of Indian class III gaming or that the Court fashion an alternative remedy to allow tribes to proceed without state participation.[1]

SUMMARY OF ARGUMENT

As the brief of Petitioner, the Seminole Tribe of Florida, and other amici will show, the Indian Commerce Clause provides Congress with the plenary power to abrogate states' Eleventh Amendment immunity. The purpose of this brief is to show by reference to legislative history that Congress, in a political process in which the states participated, adopted the class III tribal-state compacting process approach as a compromise between the competing sovereign interests of tribes and states. The class III compacting process, while perhaps not fully embraced by either side, is binding on each side. Earlier versions of IGRA and reactions to the Court's *Cabazon* decision[2] show that the debate on Indian gaming focused almost entirely on conflicting regulatory interests of tribes and states. The tribal-state compacting provisions, absent from earlier unsuccessful bills, were included in IGRA in an effort to resolve competing sovereign interests. There is scant evidence in the legislative history of state opposition to the compacting provisions and there is absolutely no evidence of any state opposition based on Eleventh Amendment grounds.

The legislative history also shows that Congress, as part of the compromise, allowed the states a voice they

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Court.

[2] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

would not otherwise have had in the regulation of Indian gaming by incorporating the public policy test set forth in the *Cabazon* decision. Congress understood and expected that states would adhere to the compacting process and work with tribes to complete compacts in accordance with the provisions of IGRA. Initially, this is precisely what happened. However, several states, which had offered no opposition to the compacting provisions during the legislative process, now challenge them on Eleventh Amendment grounds.

The purpose and intent of IGRA is to allow tribes the opportunity to engage in gaming, consistent with *Cabazon*, for the purpose of economic development and tribal self-sufficiency. 25 U.S.C. § 2710. That goal is paramount and overrides any state claim to immunity. Even if the Court accepts the states' position on the Eleventh Amendment immunity, it must still consider the intent of Congress to provide a remedy in the event a state fails to abide by the compacting provisions.

Should the Court determine that the states prevail on the Eleventh Amendment issue, the Court must fashion a remedy for the tribes, either by striking down IGRA in its entirety or by severing those portions of IGRA that preclude tribes from proceeding with class III games without a compact. The amici tribes submit that the enforcement and remedial provisions are fundamental to the scheme established by Congress such that mere severance of the enforcement and remedial provisions would result in a scheme wholly inconsistent with the intent of Congress. The amici tribes submit that if the Court determines that Congress lacks the constitutional authority to abrogate states' immunity from suit, it should grant certiorari of the State of Florida's cross-petition in this matter, (Docket Number 94-219) and the Petition of the State of Alabama in *Poarch Band of Creek Indians v. State of Alabama*, (Docket Number 94-35), and determine the remedy for tribes in the absence of an agreed upon tribal-state compact.

ARGUMENT

I. THE LEGISLATIVE HISTORY OF IGRA SHOWS THAT CONGRESS ADOPTED THE CLASS III TRIBAL-STATE COMPACTING PROVISIONS TO RESOLVE COMPETING SOVEREIGN INTERESTS.

A. The Legislative History of IGRA and Reactions to the *Cabazon* Decision Indicate That the Debate Over Indian Gaming Focused on Tribal and State Regulation of Indian Gaming on Indian Lands.

The Indian Gaming Regulatory Act passed in the 100th Congress and was signed into law as P.L. 100-497 by President Reagan on October 17, 1988. Enactment of this Act was the culmination of several years of Congressional hearings and debates that began in the 98th Congress:

> [IGRA] is the outgrowth of several years of discussions and negotiations between gaming tribes, states, the gaming industry, the Administration and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands.

S. Rep. No. 446, 100th Cong., 2d Sess. 1 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3071.

In the 98th Congress (1984-85), bills were introduced in both the House and Senate. While Committees in both bodies held hearings, no other official action occurred. S. Rep. No. 446, 100th Cong., 2d Sess. 3 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3073.

In the 99th Congress (1985-86), the level of Congressional activity increased dramatically. The House Committee on Interior and Insular Affairs held three hearings in 1985 on two Indian gaming bills, H.R. 1920 and H.R. 2404 (three additional bills on Indian gaming were introduced in the House in the 99th Congress). *Id.*

Charman Morris K. Udall of the House Interior and Insular Affairs Committee sponsored H.R. 1920, the bill that emerged as the primary legislative vehicle for Indian gaming in the 99th Congress. *Id.* As reported to the House floor in April 1986, H.R. 1920 would have placed regulation of class III gaming jointly with tribal governments and the proposed new National Indian Gaming Commission. *Id.* Tribes were vocal and adamant in their opposition to any intrusion of state jurisdiction and supported the bill as reported.

On April 29, 1986, just eight days after passage of the House bill, the Court docketed the *Cabazon* case. The Court's decision to review the *Cabazon* case, which had been a solid victory for the tribes at the Appeals Court level, caused concern among tribal government leaders who may have viewed the granting of certiorari to the State of California as a negative signal from the Court. Had the Court denied certiorari and let the Appeals Court decision stand, tribal leaders may have had more confidence in their position against intrusion of state regulatory jurisdiction in Congress. Ultimately, of course, the Court upheld the Ninth Circuit Court of Appeals' decision in the *Cabazon* case, but not until February 1987. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). During that interim period a considerable amount of legislative activity continued in Congress with debate focused on the scope of state jurisdiction of Indian gaming activities.

B. S. 555 Was Amended To Include the Tribal-State Compact Provision To Accommodate Competing Tribal and State Interests and To Provide an Enforcement Mechanism To Insure Tribes' Ability To Engage in Class III Gaming.

As introduced on February 19, 1987, Senate Bill 555, which eventually became IGRA,[3] would have made class

[3] Other Indian gaming bills introduced in the 100th Congress included S. 1303, introduced on June 2, 1988, by Senators McCain, Inouye, and Evans; S. 1841, introduced on November 4, 1987 by Senators Hecht and Reid; H.R. 1079, introduced on February 4, 1987 by Representatives Udall and Bereuter; H.R. 964, introduced on February 4, 1987 by Representatives Coelho, Lujan and Pepper; H.R. 2507, introduced on May 21, 1987 by Representatives Udall, Young, Campbell, Smith and Bereuter; and H.R. 3605, introduced on November 3, 1987 by Representatives Vucanovich and Bilbray. S. 1303 and H.R. 2507 were identical bills when introduced and H.R. 2507 became the House legislative vehicle for Indian gaming. S. Rep. No. 446, 100th Cong., 2d Sess. 4 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3074.

III gaming unlawful on Indian lands under section 1166 of title 18 of the United States Code, *unless* such gaming activity was located in a state where the gaming was "otherwise legal" and the Secretary of the Interior consented to the transfer of all civil and criminal jurisdiction "pertaining to the licensing and regulation of gaming . . . to the State within which such gaming enterprise" was to be located. S. 555, 100th Cong., 1st Sess. § 11 (1987). The glaring problem with that scheme was the lack of an enforcement mechanism to insure that states would in fact assume jurisdiction over and allow gaming on Indian lands.[4]

[4] Recognition of this problem by Congress is evidenced by Rep. Vucanovich's statements on S. 555, as amended to include the current tribal-state compact provisions:

> Many State law enforcement officials had advocated complete State jurisdiction over gaming on Indian lands. Some tribes, on the other hand, advocated strictly tribal jurisdiction over all forms of gaming by requiring the States and the tribes to negotiate with one another, this bill favors neither State jurisdiction nor exclusive tribal control.
>
> In order to meet tribal concerns that States may refuse to allow them to initiate class III gaming, the bill includes protections for tribes in the process or [sic] achieving a compact. In particular, the bill requires States to negotiate in good faith with the tribes and establishes standards for determining whether this requirement has been met. The bill grants tribes a federal cause of action against States for failure to negotiate in good faith. If a court finds that the State did not negotiate in good faith, the bill prescribes further procedures, including a court-ordered second round of

On February 25, 1987, just six days after the introduction of S.555, the Court issued its decision in the *Cabazon* case. The decision helped to buttress the tribes' position objecting to the imposition of any state regulation on Indian lands.[5] On May 13, 1988, the class III jurisdictional arrangement was adopted by the Committee when it acted on the bill at a business meeting and ordered an amendment in the nature of a substitute to be reported to the full Senate. The substitute amendment contained the tribal-state compact provisions of IGRA. Chairman Daniel K. Inouye's statement at the business meeting is instructive in tracing the development of the tribal-state compacting provision for class III provided in IGRA. He said:

> "[C]ertain principles have been part of established law for over 150 years since the Supreme Court first articulated the principle that Indian tribal governments are sovereign, domestic dependent sovereigns that have all the attributes of any sovereign entity subject to the powers and rights of the federal government. Our Constitution establishes a relationship for tribal governments that is exclusive to the federal government. Unless authorized by federal law, the jurisdiction of state governments does not apply on Indian lands. We have come a long

negotiations, submittal of the matter to a mediator, and the establishment of class III gaming procedures by the Secretary of the Interior.

134 Cong. Rec. H8154 (1988).

[5] Many tribes opposed the imposition of any state involvement as an unjust intrusion on tribal sovereignty and maintained this position during the development of S. 555 in the 100th Congress. Just after passage of IGRA, the Red Lake Band of Chippewa Indians and other tribes filed an unsuccessful suit in the Federal District Court for the District of Columbia challenging the constitutionality of the Act. *Red Lake Band of Chippewa Indians v. Swimmer*, 740 F. Supp. 9 (D.D.C. 1990), *aff'd sub nom, Red Lake Band of Chippewa Indians v. Brown*, 928 F.2d 467 (D.C. Cir. 1991).

> way since the period of termination policy of the 1950's, and I believe that it is important that the legislation we consider here today recognize the fundamental principles of Indian law, one of which is the tribal governments will not be subject to state jurisdiction absent their consent.
>
> * * * *
>
> What I propose to the Committee today is a mechanism that will provide for the comprehensive regulation of gaming activities on Indian lands employing existing state licensing and regulatory schemes, *only* if tribal governments in exercising their sovereign prerogatives, choose to submit themselves to state jurisdiction. . . . I believe that the best means of assuring tribal government consent to the jurisdiction of state laws is a mechanism that has been used many times over the course of our history between equal sovereigns—the right to enter into compacts that is recognized in the Constitution. These compacts would be negotiated at arms length between two sovereign entities—state and tribal governments. . . . Failure to reach a compact within a given time period will constitute sufficient cause for a cause of action in federal district court, in which the state will have the burden of proof to demonstrate why a compact was not concluded with the applicant tribal government. Should a court find against a state, the Secretary of the Interior will be empowered to impose a compact under which the two sovereign entities will operate. . . . I believe this approach will accomplish several objectives. One, it will assure that state governments are encouraged to enter into good faith negotiations with tribal governments. Two, it will assure that state laws are not applied on Indian lands without tribal government consent and action to request the application of state laws. Third, it will assure a comprehensive scheme of licensure and regulation of Indian gaming activities consistent with the state law.

Unpublished Statement of Chairman Inouye, May 13, 1988, National Archives, RG 46 Records of the U.S. Senate, Indian Affairs, 100th Cong., Legislative Bill Files (1987) S.555, Box No. 100-22.

The Committee report reflects the importance of the tribal-state compacting process as a compromise and an enforcement mechanism:

> After lengthy hearings, negotiations and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation. . . . The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a mechanism for setting [sic] various matters between two equal sovereigns.

S. Rep. No. 446, 100th Cong., 2d Sess. 13 (1988), *reprinted in* 1988 U.S. Code Cong. & Admin News 3071, 3083.

C. IGRA Passed on a Voice Vote in the Senate and by an Overwhelmingly Favorable Vote in the House, Indicating the Strong Support of Congress for the Compromise Compacting Provision for Class III Gaming.

The Senate debated and passed S. 555 by voice vote on September 15, 1988. During the debate, only two Senators voiced opposition to the bill: Senator Burdick because of concerns of the State of North Dakota about the scope of games that would be subject to the compacting process, 134 Cong. Rec. S12655-56 (1988), and Senator Daschle of South Dakota opposed the bill because tribes in South Dakota did not support the class III tribal-state compacting provisions. *Id.*, at S12657. No Senator opposed the compacting procedures or spoke on behalf of any state so opposed.

The House debated the bill, S. 555, on September 26, 1988, and the bill passed on September 27, 1988, by a vote of 323 to 84. *Id.*, at H8153-57, 8426-27. During the House floor debate on September 26, 1988, only three members spoke in opposition to the bill: Representatives Frenzel and Sikorski from Minnesota opposed the bill because of the potential imposition of state jurisdiction on Indian lands through the tribal-state compacting process, *Id.*, at H8155-57; Representative Henry of Michigan opposed the bill because he objected to the "grandfather" clause for certain class II card games played by tribes in the State of Michigan. *Id.*, at H8155. Not a single member of the House of Representatives spoke in opposition to the bill on behalf of any state with respect to the compacting provision.

S. 555 passed with unanimous consent without a recorded vote in the Senate. The vote was nearly four to one in the House. Clearly there was strong Congressional support for the compacting provision. State opposition to the compact provisions in the legislative record is limited to the concerns expressed by Senator Burdick on the matter of scope of games.

II. CONGRESS INCORPORATED THE PUBLIC POLICY TEST SET FORTH IN THE *CABAZON* DECISION IN IGRA IN RESOLVING COMPETING SOVEREIGN INTERESTS.

In enacting IGRA, Congress made the express finding that:

> Indian Tribes have the exclusive right to regulate gaming on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of

> criminal law and *public policy*, prohibit such gaming activity.

25 U.S.C. § 2701(5) (emphasis added).

By adopting the Court's balancing of tribal, federal and state interests analysis and *Cabazon's* public policy test into IGRA, Congress decided to allow the states a voice they would not otherwise have had in regulating Indian gaming. Every federal court, except one,[6] which has addressed the question has held that the public policy test set forth in *Cabazon* determines the scope of class III gaming under IGRA. *See Machantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1031 (2nd Cir. 1990), *cert. denied*, 499 U.S. 975 (1991) ("We accordingly conclude that the district court was correct in applying the *Cabazon* criminal/prohibitory—civil/regulatory test to Class III gaming"); *Coeur D'Alene Tribe v. Idaho*, 842 F.Supp. 1268, 1282 (D. Idaho 1994) ("*Cabazon* and IGRA clearly restrict gaming on Indian lands to those types of [class III] games permitted by the state and/or those games which do not violate the law and public policy of the state"); *Ysleta Del Sur Pueblo v. Texas*, 852 F.Supp. 587, 592 (W.D. Texas 1993) ("The civil/regulatory and criminal/prohibitory analysis was intended to be part of the IGRA framework determining the appropriate scope of Class III gaming.") *rev'd on other grounds*, 36 F.3d 1325 (5th Cir. 1994), *cert. denied*, 63 USLW 3685 (1995), *cert. denied*, 63 USLW 3689 (1995); *Lac du Flambeau Band of Lake Superior Chippewa Indians and the Sokaogon Chippewa Community v. Wisconsin*, 770 F. Supp. 480, 486 (W.D. Wis. 1991), *appeal dismissed*, 957 F.2d 515 (1992), *cert. denied*, 113 U.S. 91 (1992) ("the initial question in determining whether Wisconsin permits the gaming activities [under IGRA] is whether Wisconsin public policy towards Class III gaming is regulatory or prohibitory").

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[6] *See Rumsey Indian Rancheria of Winton Indians v. Watson*, 1994 WL 635178 (9th Cir. 1994), *motion for rehearing and rehearing en banc pending.*

These courts applied the *Cabazon* test as intended by Congress:

> [T]he Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*.

S. Rep. No. 100-446, 100th Cong., 2d Sess. 6 (1988).

IGRA permits states to be involved in a process that had previously excluded them. IGRA is the political embodiment of Congress' reaction to the Supreme Court's ruling in *Cabazon*, and embodies the fundamental holdings of the *Cabazon* Court. IGRA does accommodate states by allowing them to participate in the process to establish a regulatory framework for class III gaming by requiring that regulation of class III gaming activities be pursuant to the terms of tribal-state compacts negotiated between two sovereign governments. The states that sit down at the negotiation table with tribes, ostensibly pursuant to IGRA, are the same states who, when confronted with IGRA's remedial provisions, assert IGRA is unenforceable against them. In other words, states take the position that not only does IGRA allow states to be involved in the process of establishing a regulatory framework for class III gaming, it also allows states unequivocally to preclude class III gaming on Indian lands simply by refusing to consent to suit pursuant to IGRA. The Ninth Circuit noted the irony and inconsistency of the states' position in *Spokane Tribe of Indians v. Washington State, et al.*, 28 F.3d 991 (9th Cir. 1994) (cert. pending DK #94-357), 63 USLW 3161 (1994):

> In grappling with the sensitive issues following the state of California's defeat in *Cabazon Band*, Con-

gress tried to fashion a plan that would enable states to have a voice in how tribal gaming should operate and to enforce to some degree the states' own laws. The states' immunity from suits under the Eleventh Amendment should not frustrate that goal. *Indeed, principles of state sovereignty are singularly out of place in such a scheme,* where the federal government is tailoring a limited grant of power to the states. In this case, sovereign immunity would undermine rather than promote the assertion of state interests.

Id. at 997 (emphasis added).

III. AFTER IGRA WAS ENACTED, MANY STATES ADHERED TO THE COMPROMISE STRUCK IN IGRA AND WORKED WITH TRIBES TO COMPLETE COMPACTS WITHOUT RAISING ELEVENTH AMENDMENT CHALLENGES.

Immediately after IGRA was enacted, many states accepted and proceeded with the compact process as Congress envisioned. One of the earliest and best examples of how IGRA's remedial and enforcement provisions can work is found in the experience between the Mashantucket Pequot Tribe and the State of Connecticut. Governor Weicker's administration refused to negotiate with the Pequot Tribe. After 180 days had passed since the Tribe's formal requests to enter into good faith negotiations under IGRA, the Tribe filed suit in federal court pursuant to 25 U.S.C. § 2710(d)(7)(B)(i). *Mashantucket Pequot*, 913 F.2d at 1027. After the court found Connecticut had failed to conclude negotiations in good faith, the court ordered the sixty day negotiation/mediation process set forth in 25 U.S.C. § 2710(d)(7)(B)(iv). Connecticut refused to consent to the compact selected by the Mediator, which resulted in the Secretary prescribing, in consultation with the Pequot Tribe, procedures consistent with the proposed compact selected by the Mediator. 56 Fed. Reg. 24996-98 (1991). Since then, the State and the Tribe have come to full agreement on gaming issues and are no longer in an adversarial relationship. As a result, the Mashantucket Pequot Tribe has achieved the tribal economic development, tribal self-sufficiency, and strong tribal government that Congress intended in enacting IGRA. 25 U.S.C. §§ 2701(4), 2702(1). The Mashantucket Pequot experience stands as a visible example of how Congress intended the remedial and enforcement provisions of IGRA to work.

However, after the initial successes of IGRA's compacting process in Connecticut, Minnesota and elsewhere, several states now raise Eleventh Amendment defenses to good faith lawsuits brought by tribes under IGRA when negotiations break down.[7] In essence, these states are doing just what Congress and the tribes most feared: that is, they are preventing the compacting process for class III gaming by tribal governments from going forward.

IV. IF THE ELEVENTH AMENDMENT BARS THE TRIBES' CLAIMS AGAINST STATES AND STATE OFFICIALS, IGRA MUST OTHERWISE PROVIDE A REMEDY FOR TRIBES.

The crux of the tribes' argument is that Congress did not intend, and federal courts cannot interpret, IGRA to allow states totally to preclude tribes of their class III gaming rights simply by refusing to negotiate in good faith, and then refusing to consent to the jurisdiction of the federal courts. The amici tribes have consistently maintained that the better-reasoned ruling is that the states' Eleventh Amendment defense fails. However, if Congress lacks the constitutional authority to abrogate Eleventh

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[7] More recently, states have raised yet another defense that IGRA violates the Tenth Amendment. *See Rumsey Indian Rancheria of Winton Indians v. Wilson*, 41 F.3d 421 (9th Cir. 1994), *motion for rehearing and rehearnig en banc pending. Confederated Tribes of the Colville Reservation v. State of Washington.* 20 ILR 8124 (1993).

Amendment immunity, the courts must otherwise interpret IGRA in a manner that provides a remedy for tribes. This section addresses the implications of Congress lacking authority to abrogate the states' Eleventh Amendment immunity, and the application of severance analysis to determine the tribes' remedy in the absence of federal court jurisdiction over states hostile to IGRA and hostile to the tribes with Indian lands in those states.

A. If an Adequate Remedy Is Not Otherwise Available to Tribes, IGRA in Its Entirety Should Be Struck Down as Unconstitutional.

If Congress lacks the authority under the Indian Commerce Clause to abrogate states' Eleventh Amendment immunity, and no remedy for a state's refusal to negotiate in good faith is otherwise available to tribes, the entire IGRA must fall and the applicable law governing Indian gaming will be the *Cabazon* decision, wherein states will have no role, whatsoever, in the regulation of class III gaming on tribal lands. The compacting process is the crux of the entire IGRA; if the Tribe has no recourse against a State that fails to negotiate in good faith, the foundation of IGRA will have collapsed.

An entire legislative act of Congress should be ruled unconstitutional if: (1) it is evident that Congress would not have enacted those provisions which are within its power, independently of that which is not within its power; (2) the legislation cannot function independently of the flawed provision; (3) the legislation, absent the flawed provision, will not operate in a manner consistent with the intent of Congress; or (4) the statute created in the absence of the flawed provision is one which Congress would not have enacted. *Alaska Airlines v. Brock*, 480 U.S. 678, 684-86 (1987); *see also, Sloan v. Lemon*, 413 U.S. 825, 834 (1973). *Carter v. Carter Coal Co.* 298 U.S. 238, 314-16 (1936). All four tests are mere variations of the courts' responsibility to reflect Congressional intent. *The lodestar of Supreme Court case law*

on the issue of severability is legislative intent. Regan v. Time Inc., 468 U.S. 641, 653 (1985).

Without recourse against states, the remaining shell of a statute would be nonsensical. Government-to-government negotiations would be transformed into tribal subservience to arbitrary state control. IGRA's express purpose of "promoting tribal economic development, self sufficiency, and strong tribal government," 25 U.S.C. §§ 2701(4), 2702(1), would be a mockery. Congress would not have enacted any other portion of IGRA without recourse available to tribes with Indian lands in states hostile to IGRA.

If the elimination of an enforcement provision essentially eviscerates a statute and creates a program quite different from the one Congress actually adopted, the entire statute must be found to be unconstitutional, regardless of the presence of a severability clause. *Sloan v. Lemon*, 413 U.S. 825, 834 (1973). If Congress intended to have various components of a statutory scheme either operate together or not at all, failure of one component causes the entire Act to fall. *Gubiensio-Ortiz v. Kanahele*, 857 F.2d 1245 (9th Cir. 1988), *stay denied* 857 P.2d 1285, *cert. gr. judg. vacated* 109 S. Ct. 859 *on remand* 871 F.2d 104 (1989) (striking down federal sentencing commission). If a law without the flawed provision would cause an unintended result, the entire law must fall. *Matter of Reyes*, 910 F.2d 611 (9th Cir. 1990) (striking executive order entitling aliens in the armed services to become citizens). The critical question remains; does the removal of a flawed provision (allegedly IGRA's enforcement and remedial provision) cause the remaining provisions of IGRA to work in a manner that constitutes a significant departure from initial Congressional intent?

The tribes' ability to file suit against uncooperative states, which is embodied in IGRA's abrogation of

state sovereign immunity, is so fundamental and essential to the workings of IGRA that the entire statute should be struck down if this Court adopts the states' position on the Eleventh Amendment immunity, unless this Court, through severability analysis is otherwise able to provide a remedy to the tribes. The facts surrounding the adoption of IGRA fit each and every one of the variations of the severability test set forth above. In contrast, the states argue that only the enforcement of remedial provisions of IGRA should be struck. The remaining text of IGRA would then allow the states to preclude a tribe from class III gaming by simply refusing to consent to suit.

One effect of merely severing the enforcement or remedial provision is the deprivation of the tribes' ability to engage in class III gaming if states simply ignore the tribes' request. Congress intended to avoid this effect:

> It is the Committee's intent that the compact requirement for class III not be used as justification by a state for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.

S. Rep. No. 446, 100th Congress, 2d Sess. 13, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3082. IGRA was intended to provide a means by which tribes may conduct class III gaming; severance of the enforcement or remedial provision produces just the opposite result, one in which there is no class III gaming whatsoever.

A second effect of merely severing the enforcement or remedial provision is the arbitrary and outright transfer of state jurisdiction in those states that are willing to permit class III gaming. The tribes will have no leverage in the negotiation process; they would either have to succumb to states' demands, or forgo any class III gaming

opportunities. Congress had considered and rejected a statutory scheme that granted regulatory authority to states. Senator Inouye, then Chairman of the Senate Select Committee for Indian Affairs, expressed the reason for rejecting such a scheme:

> [T]he committee was fully cognizant of the strenuous objections that would be raised by tribes to any outright transfer of State jurisdiction, even for the limited purpose of regulating class III gaming.

134 Cong. Rec. S12650 (Sen. Inouye). Former U.S. Representative Morris Udall, then the Chairman of the House Interior and Insular Affairs Committee, made a similar statement:

> Over the years, I have strongly resisted the imposition of State jurisdiction over Indian tribes in this and other areas . . . S 555 is the culmination of nearly six years of congressional consideration of this issue. The basic problem which has prevented earlier action by Congress has been the conflict between the right of tribal self-government and the desire for State jurisdiction.

134 Cong. Rec. H8153 (Rep. Udall). The effect of IGRA without the enforcement or remedial provision is to eliminate the very tribal sovereignty that IGRA was intended to protect.

The inevitable consequences of an IGRA without abrogation of state immunity demonstrate the massive importance the enforcement or remedial provision played in establishing the Congressional scheme for the regulation of class III gaming. The compact process is the key to the delicate balance desired by Congress:

> [T]he Committee has attempted to balance the need for sound enforcement of gaming laws and regulations with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian lands. The

> Committee recognizes and affirms the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished.

S. Rep. No. 446, 100th Congress, 2d Sess. 5, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3076. The negotiations were intended to be among sovereign equals:

> This bill establishes a framework in which Indian tribes and States can meet as equals, government-to-government, to negotiate an agreement—a compact—for a mutually acceptable method of regulating high-stakes gambling on Indian reservations.

134 Cong. Rec. H8155 (Rep. Coelho). This equality was to be achieved by the recourse available to tribes to sue uncooperative states in federal court:

> [25 U.S.C. § 2710(d)(7)] grants the tribe a right to sue a state if compact negotiations are not concluded. This section is the result of the Committee balancing the interests and rights of tribes to engage in gaming interests against the interests of States in regulating such gaming . . . the issue before the Committee was how to best encourage States to deal fairly with tribes as sovereign governments. The Committee elected as the least offensive option, to grant tribes the right to sue a State if a compact is not negotiated. . . .

S. Rep. No. 446, 100th Congress, 2d Sess. 14, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3084. Without the enforcement or remedial provision, the delicate balance intended by Congress is impossible to achieve.

B. If IGRA's Remedial Provisions Breach the Eleventh Amendment, the Court Should Grant the States' Cross-Petition for Certiorari and Determine an Adequate Remedy for Tribes.

When faced with fashioning a remedy with a constitutionally defective statute, the Supreme Court has encouraged restructuring the statute to adopt simple and equitable results. *Califano v. Westcott,* 443 U.S. 76, 93 (1979). The federal courts may draw from their broad powers in equity in fashioning the remedy. *Id.* Often in the context of statutes extending benefits to a particular class, the federal courts have upheld extending the coverage of a statute to include those who are aggrieved by a constitutionally defective exclusion. *Heckler v. Mathews,* 465 U.S. 728, 738 (1984) (pension offset plan extended to apply to nondependent women as well as nondependent men). Specifically, the courts should measure the intensity of commitment to the residual policy and consider the potential disruption of the statutory scheme that would occur by extension as opposed to exclusion. *Id.; Welsch v. United States,* 398 U.S. 333, 365 (J. Harlan concurring). IGRA need not be struck down in its entirety if the courts otherwise provide a viable remedy. Many tribes, including several of the amici tribes submitting this brief, are successfully operating class III gaming pursuant to tribal-state compacts and prefer to continue operations pursuant to those compacts. Fashioning a remedy for tribes confronted with hostile state governments is the preferred and least disruptive result.

The most thorough discussion in IGRA cases addressing the ability of a tribe to go forward with class III gaming activities without a compact is Judge Fremming Nielsen's severance analysis in *Confederated Tribes of the Colville Reservation v. Washington,* 20 ILR 3124 (E.D. Wash. 1993). After determining that the Confederated Colville Tribes' lawsuit under IGRA against Washington State must be dismissed because Congress lacks

constitutional authority to subject unconsenting states to the jurisdiction of the federal courts (Eleventh Amendment) and to compel states to negotiate fairly with tribes (Tenth Amendment), Judge Nielsen ruled that IGRA must provide recourse to the tribes:

> *If this court were to only sever the mandatory language from IGRA, the Tribe would be left without recourse if they are unable to reach an Agreement with the State.* Thus subsection (d) regarding class III gaming is not fully operable without the unconstitutional language. Further, even if subsection (d) were fully operable without the unconstitutional portions, the language of the Act and the legislative history indicate State participation and speedy resolution of any impasse were key components of the bill. . . *Therefore the entire subsection (d) regarding class III gaming must be severed from the act as unconstitutional.*

20 ILR at 3127 (emphasis added). Judge Nielsen lays out a two part test to determine what remains and what must be struck from IGRA: (1) if severed, are the remaining provisions fully operative; and (2) if fully operative, would Congress have enacted IGRA without the deleted provisions. *Id.* Judge Nielsen, in striking all of 25 U.S.C. § 2710(d) may have been overbroad, and instead should have been more meticulous in determining what portions of § 2710(d) should be struck, and what other portions should be saved.

For example, both 18 U.S.C. § 1166 and IGRA's exemption of 15 U.S.C. § 1175 (the Johnson Act), set forth that class III gaming is subject to criminal sanctions and civil forfeiture unless a compact is in place. IGRA's exemption of the Johnson Act is embodied in § 2710(d) and both are operable without the unconstitutional language requiring a tribal-state compact. Congress clearly intended for Tribes to be able to regulate machine gaming in states where machine gaming is "permitted" gaming.

Hence the portion of 18 U.S.C. § 1166 excluding class III gaming from its definition of gambling should be read without reference to a compact (material shown in italics to be struck):

> **(c) For the purpose of this section, the term 'gambling' does not include—**
>
> > **"(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or**
> >
> > **"(2) class III gaming** *conducted under a Tribal State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.*

18 U.S.C. § 1166 (material shown in italics to be struck). Similarly, IGRA's explicit exemption of class III gaming from the Johnson Act should be read without reference to a compact.

> **The provisions of section 1175 of Title 15 shall not apply to any gaming conducted [in]** *under a Tribal State compact that—*
>
> > *(A) is entered into under paragraph (3) by* **a State in which gambling devices are legal,** *and*
> >
> > *(B) is in effect.*

25 U.S.C. § 2710(d)(6) (materials shown in italics to be struck). Under the logical extension of Judge Nielsen's analysis, class III gaming must still be played pursuant to tribal law and regulation, must still be played pursuant to an ordinance approved by the National Indian Gaming Commission, and must still be "permitted gaming for any purpose by any person, organization or entity," in the applicable state, must be conducted in

conformance with the provisions of IGRA and any other applicable federal law, but the requirement of a compact should be severed from their application.

The Eleventh Circuit addressed the remedial issue in its determination that tribes may proceed to the Department of interior for procedures in lieu of a compact. *Seminole Tribe,* 11 F.3d at 1029, which ruled in pertinent part:

> Nevertheless, we are left with the question as to what procedure is left for an Indian tribe faced with a state that not only will not negotiate in good faith, but also will not consent to suit. The answer, gleaned from the statute, is simple. One hundred and eighty days after the tribe first requests negotiations with the state, the tribe may file suit in district court. If the state pleads an Eleventh Amendment defense, the suit is dismissed, and *the tribe, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing class III gaming on the tribe's lands.* This solution conforms with IGRA and serves to achieve Congress' goals, as delineated in §§ 2701-02.

11 F.3d at 1029 (emphasis added). The amici tribes suggest that the extension of Judge Nielsen's analysis is the better-reasoned approach, but agree with the Eleventh Circuit that IGRA must be interpreted in a manner that provides a viable remedy for the tribes. The states' Petition for Certiorari asks that the cited portion of the Eleventh Circuit opinion be reviewed. If the court concludes that Congress lacks constitutional authority to abrogate Eleventh Amendment immunity, the amici tribes concur that certiorari should be granted in two cases: to the State of Florida's cross-petition in this matter (Docket Number 94-219) and to the Petition of the State of Alabama in *Poarch Band of Creek Indians v. State of*

Alabama (Docket Number 94-35). Both the Eleventh Circuit and the courts in *Colville Tribes* have ruled that IGRA must be interpreted in a manner that provides an adequate remedy to the tribes.

Those two approaches are among others that this Court should consider if the Court determines that Congress lacks the authority to abrogate Eleventh Amendment immunity. A remedy must be available to the tribe, whether it be a compact, a court-appointed mediator, departmental regulations, or exclusive tribal law and regulation. If no remedy exists, then no IGRA exists. The federal District Court in *Willis v. Fordice,* 850 F.Supp. 523 (S.D. Miss. 1994) also reinforces the amici tribes' position:

> Alternatively, even if IGRA is unconstitutional, the Court must adhere to the decisions of the United States Supreme Court. Therefore, under the holding from *Cabazon Band,* the Court finds that *even if Congress lacked the authority to set forth the procedures under IGRA and abrogate the Eleventh Amendment immunity of the states, gaming must still be allowed on Indian lands.*

850 F.Supp. at 530 (emphasis added). The result here is driven by Congressional intent. Congress clearly intended that tribes be able to exercise their sovereign right to offer all forms of gaming that are consistent with the public policy set forth in the landmark case, *Cabazon.* The amici tribes implore this court to further give meaning to the legislative intent underlying passage of IGRA regardless of the constitutionality of IGRA's abrogation of Eleventh Amendment immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 94-12

In the Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

v.

STATE OF FLORIDA, AND
LAWTON CHILES, GOVERNOR OF FLORIDA

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, IN SUPPORT OF THE SEMINOLE TRIBE OF FLORIDA

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the Miccosukee Tribe of Indians of Florida, files this brief in support of Petitioner, the Seminole Tribe of Florida.[1] The Miccosukee Tribe has existed as an independent federally-recognized Indian tribe since 1962 when it organized a council and board, pursuant to the Indian Reorganization Act, and formally became the Miccosukee Tribe of Indians of Florida. In 1971, the Miccosukee Tribe of Indians of Florida was the first Indian tribe in the nation to formalize a contract with the Bureau of Indian Affairs whereby it assumed complete responsibility for managing its own financial, social, economic, and political affairs.

Petitioner, the Seminole Tribe, sought a Tribal-State compact with the State of Florida, required under the Indian Regulatory Gaming Act (IGRA) as a pre-condition to establishing Class III gaming. When negotiations did not result in a compact, the Seminole Tribe sued the State of Florida. IGRA was enacted at the urging of states who wanted a voice in Indian gaming after the Supreme Court decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), which reconfirmed that tribal sovereignty is subordinate only to the federal government.

The State of Florida asserted sovereign immunity to bar the Seminole Tribe's suit under IGRA, even though IGRA was legislation which the states themselves had sought. The outcome of this litigation will directly affect the course of the Miccosukee Tribe's negotiations with the State as well as any litigation which might arise from those negotiations. The State of Florida's assertion of immunity, if sustained, would preclude Indian tribes from asserting

[1]Letters of consent to file this brief for Amicus Curiae have been filed with the Clerk of the Supreme Court.

their rights under IGRA to establish Class III gaming. One of IGRA's primary goals is to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments. 25 U.S.C. §2702(1). For the reason expressly set forth in IGRA – to obtain economic self-sufficiency – the Miccosukee Tribe sought a Tribal-State compact with the State of Florida in late 1993; the State failed to negotiate the compact in good faith.

In summary, the Miccosukee Tribe joins as Amicus Curiae in support of Petitioner, the Seminole Tribe of Florida, because the Eleventh Circuit Court of Appeal's decision that sovereign immunity barred the lawsuit by the Seminole Tribe against the State, has a direct and economically adverse effect on the Miccosukee Tribe of Indians which also is seeking to establish Class III gaming activities and which also has unsuccessfully sought a compact with the State of Florida.

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case of Petitioner, Seminole Tribe of Indians.

SUMMARY OF ARGUMENT

The State of Florida relied on sovereign immunity to bar the Petitioner's lawsuit which alleged that the State had failed to negotiate in good faith, as required by the Indian Gaming Regulatory Act. The suit sought to compel the State, through the Governor, to conclude the Tribal-State compact and also requested declaratory judgment on the obligations of the State of Florida under IGRA to negotiate in good faith regarding the conduct of Class III gaming.

The State's assertion of Eleventh Amendment immunity should be rejected. The Eleventh Amendment does not by its terms preclude citizens from suing their own state; rather, it prohibits suits against a state by citizens of another state or by aliens. The judicially created doctrine of sovereign immunity found in *Hans v. State of Louisiana*, 134 U.S. 1 (1890), which bars citizens from suing their states, should be revisited.

Even if *Hans v. Louisiana* is not revisited, Congress had the power to abrogate the States' sovereign immunity when it enacted IGRA and it clearly intended to abrogate this immunity. The Eleventh Circuit Court of Appeals erred by reversing the district court's denial of the State's motion to dismiss on sovereign immunity grounds, on the basis that Congress did not have the power under the Indian Commerce Clause to enact IGRA. Congress had the power to abrogate the State's sovereign immunity under both the Indian Commerce Clause and the Interstate Commerce Clause. Both clauses derive from the same plenary grant of power in the Constitution, Article I, §8 cl.3.

Through the Indian Commerce Clause the states relinquished authority over Indian affairs to the federal government. Pursuant to its plenary power to legislate in the field of Indian affairs, Congress had the power to abrogate the sovereign immunity of the states. The Interstate Commerce Clause also gave Congress the power to enact IGRA because one of the stated concerns in its enactment was to prevent infiltration by organized crime in Indian gaming. At the urging of the states, and in order to provide the states with a voice in Indian gaming, Congress enacted IGRA. Having urged for its passage, the states cannot at the same time assert sovereign immunity to bar a suit by an Indian tribe for the state's failure to negotiate in good faith as required by the Act.

Finally, the Eleventh Amendment does not prohibit suits against state officials based upon federal law when prospective injunctive or declaratory relief is sought to vindicate federal law. Thus, under the doctrine of *Ex parte Young*, the relief requested by Petitioner is proper and the decision of the Eleventh Circuit should be reversed.

ARGUMENT

I.

THE ELEVENTH AMENDMENT DOES NOT EXPRESSLY BAR A CITIZEN FROM SUING THAT CITIZEN'S OWN STATE.

The language of the Eleventh Amendment does not expressly bar a citizen from bringing a suit against his own state. To the contrary, the text of the Eleventh Amendment refers only to suits brought by citizens of another state or a foreign country:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any Foreign State.

However, in *Hans v. State of Louisiana*, 134 U.S. 1 (1890), the Supreme Court held that a citizen's suit against that citizen's own state was barred and, as a result, judicially extended the Eleventh Amendment beyond its text. In fact, the Eleventh Amendment has no application outside the context of State/citizen and State/alien diversity suits. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775 ____, 111 S.Ct. 2578, 2586 (1991) (Blackman, Marshall, Stevens, J.J., dissenting) and Amicus Curiae respectfully requests that *Hans v. Louisiana* be revisited.

Amicus Curiae urges the Court to adopt the interpretation of the Eleventh Amendment found in Justice Stevens' concurring opinion in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), which emphasizes the important "distinction between our two Eleventh Amendments." *Id.* at 23. First, there is the "correct and literal interpretation of the plain language of the Eleventh Amendment that is fully explained in Justice Brennan's dissenting opinion in *Atascadero State Hospital v. Scanlon*. In addition, there is the defense of State sovereign immunity that the Court has added to the text of the Amendment in cases like *Hans v. Louisiana*." *Union Gas, supra*, at 23-24 (citations omitted).[2] Justice Steven's opinion states that, notwithstanding the judicially created doctrine of state sovereign immunity, Congress has the plenary power to subject the States to suits in federal court:

> Suffice it to say that the Eleventh Amendment carefully mirrors the language of the citizen-state and alien-state diversity clauses of Article III and *only* provides that "[t]he Judicial power of the United States shall not be construed to extend" *to these cases*. There is absolutely nothing in the text of the Amendment that in any way affects the

[2]Had Congress intended to include the doctrine of sovereign immunity in the Eleventh Amendment, it would have done so specifically; the Eleventh Amendment was merely intended to bar citizens of another state, or aliens, from suing a state in federal court. *See e.g., Atascadero States Hosp. v. Scanlon*, 473 U.S. 234, 286-90 (1985). As the dissent pointed out in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), 111 S.Ct. 2578, there is no constitutional principle of State sovereign immunity, no constitutionally mandated policy excluding suits against States from federal court and the historical analysis that supports this view already has been exhaustively detailed in numerous decisions. Blatchford, *supra*, 111 S.Ct. at 2586.

other grants of "judicial power" contained in Article III. Plainer language is seldom, if ever, found in constitutional law.

Pennsylvania v. Union Gas, supra, 491 U.S. at 24.

Hans v. Louisiana departed from the plain language, purpose, and history of the Eleventh Amendment, extending to the states immunity from suits promised under the "arising under" jurisdictional grant of Article III, *Pennsylvania v. Union Gas, supra*, 491 U.S. at 25.[3] The expansion of state immunity is "not a matter of Eleventh Amendment law at all, but rather it is based on a prudential interest in federal-state-comity and a concern for 'Our Federalism.'" *Id.* at 25. Justice Stevens' concurring opinion correctly points out that the Eleventh Amendment, as does Article III, speaks in terms of judicial power. Thus, the question is whether the federal court has power to entertain the suit, and in cases where there is no such power, Congress may not provide it. However, many Eleventh Amendment decisions do not deal with judicial power at all but instead speak in terms of federalism and comity, and are better understood as invoking these

[3]*Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991) does not resolve the Eleventh Amendment Immunity issues in the case at bar. The Supreme Court in *Blatchford* was not asked to revisit *Hans v. Louisiana*. Instead, the respondent argued that the traditional principles of immunity presumed by *Hans* do not apply to suits by sovereign Indian tribes, and even if they did, the states had consented to suit in the "plan of the convention." *Blatchford, supra*, 111 S.Ct. at 2581. The Supreme Court rejected the respondent's argument that state sovereign immunity does not extend to suits by another sovereign (*citing* to *Monaco v. Mississippi*, 292 U.S. 313 (1934)) and also rejected the "plan of the convention" argument that the states waived their immunity against Indian tribes when they adopted the Constitution. Furthermore, the Supreme Court in *Blatchford* only addressed the question of damage suits against the State and not any issue of injunctive or other prospective relief.

concerns. *Union Gas, supra*, at 25-27. The broad notions of sovereign immunity accepted in federal jurisprudence since *Hans v. Louisiana* are not merely, "misguided as a matter of federal law" but they are also unjust. *Hess v. Port Authority Trans-Hudson Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994) (Stevens, J., concurring).[4]

If the Supreme Court adopts the interpretation of the Eleventh Amendment found in Justice Steven's concurrence, the Petitioner prevails and the State of Florida's claim of sovereign immunity fails. For purposes of the remaining arguments in this brief, however, Amicus Curiae will assume that the principles of Eleventh Amendment sovereign immunity, as embodied in *Hans v. Louisiana*, 134 U.S. 1 (1890), are applicable.

II.

CONGRESS HAS THE POWER TO ABROGATE ELEVENTH AMENDMENT IMMUNITY AND EXPRESSLY DID SO BY ENACTING THE INDIAN GAMING REGULATORY ACT (IGRA).

In enacting the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §2701 et seq., Congress unequivocally expressed its intention to abrogate the Eleventh Amendment bar to suits against the states in federal court.

[4]Particularly in this case, where the states sought the legislation, and where the legislation was a compromise to give the states some control over Indian gaming, it is truly unjust to allow the State of Florida to assert sovereign immunity when it failed to comply with its duty under IGRA. Moreover, the Seminole Tribe did not seek monetary relief and, therefore, concerns over the vulnerability of the State's purse is not a concern here, as it may be in some instances. *See e.g., Hess v. Port Authority Trans-Hudson, Corp.*, ___ U.S. ___, 115 S.Ct. 394 (1994).

Not only did Congress unequivocally intend to abrogate the State's Eleventh Amendment immunity but it had the power to do so under Commerce Clause. IGRA was enacted following the decision of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) which left Indian gaming largely unregulated by the states; it was enacted at the urging of the states, who sought to be involved in the process of regulating Indian gaming.

a. Congress Has The Power Under The Indian Commerce Clause, As Well As Under The Interstate Commerce Clause, To Abrogate Eleventh Amendment Sovereign Immunity

Although the Eleventh Amendment was not intended to bar a suit by a citizen of a State against his own State, see Argument I, *supra*, the Supreme Court has held that the principle of sovereign immunity limits the grant of judicial authority in Article III, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), and thus, in order to overcome this immunity, Congress must make its intent clear in the legislation and it must do so under a specific constitutional power.

The Eleventh Circuit acknowledged in its opinion in *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016 (11th Cir. 1994), that the Supreme Court has held that Congress has the power to abrogate a state's Eleventh Amendment immunity pursuant to the Commerce Clause; however, the court of appeals erroneously concluded that Congress' power to abrogate the Eleventh Amendment existed only pursuant to the Interstate Commerce Clause. The court of appeals distinguished the facts in the case at bar from those in *Union Gas* by finding that *Union Gas* was limited solely to the exercise of Congress' power to legislate

under the Interstate Commerce Clause. Acknowledging an intention by Congress to abrogate State sovereign immunity when it passed IGRA, the court below nevertheless found that it was passed pursuant to the Indian Commerce Clause and that the "unique abrogation power afforded Congress under the Interstate Commerce Clause in *Union Gas* could not be extended to the Indian Commerce Clause." *Seminole Tribe v. State, supra*, 11 F.3d at 1027.

The Eleventh Circuit was incorrect for a number of reasons. First, Congress had the power under the Indian Commerce Clause to abrogate the State's Eleventh Amendment Immunity. Second, Congress also had the power to abrogate the State's sovereign immunity pursuant to the Interstate Commerce Clause.

Power Under The Indian Commerce Clause

The plain language of Article I, §8, cl.3 gives Congress the power to regulate commerce and defines what types of commerce: with foreign nations, and among the several States and with the Indian Tribes. As the Supreme Court stated in the "License cases," *Thurlow v. Com. of Mass.*, 46 U.S. (5 How.) 504 (1847), the words in this clause give "all the authority which the United States have over Commerce." *Id.* at 523. The Supreme Court recognized that Congress has the power to abrogate the State's Eleventh Amendment immunity when regulating interstate commerce. *Union Gas, supra*. That the Supreme Court has recognized the existence of this power when Congress enacts legislation pursuant to the Interstate Commerce Clause does not mean that Congress does not also possess the same power when regulating commerce with Indian tribes.

The decision in *Union Gas* implicated one of the three types of commerce which Congress has the power to regulate. This does not mean, however, that Congress cannot similarly legislate with regard to the other types of commerce mentioned in the Commerce Clause, pursuant to the same constitutional grant of plenary power. As the district court noted below, "[i]t is a mistake to simply dismiss *Union Gas* as being inapposite, especially since congressional power over both interstate and Indian commerce derives from precisely the same constitutional clause, Article I, §8, cl. 3, and since its power in both areas is plenary." *Seminole Tribe v. State*, 801 F.Supp. 655 (S.D. Fla. 1992).

In *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192-93 (1989) the United States Supreme Court recognized that the Interstate Commerce Clause and the Indian Commerce Clause have very different applications:

> [W]hen the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.

Id. at 192 (citations omitted). *Cotton Petroleum* does not hold that the Indian Commerce Clause gives Congress less power than does the Interstate Commerce Clause, it simply holds that Indian tribes are not states for purposes of the Interstate Commerce Clause and that broad principles of preemption under the Interstate Commerce Clause would not apply. 490 U.S. at 191-192.

Amicus Curiae does not dispute that the Interstate Commerce Clause and the Indian Commerce Clause have different applications. Tribal reservations are not states and the "differences in the form and nature of their sovereignty make it treacherous to import to one notions of preemption that are properly applied to the other." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). However, the unique standing of federally recognized Indian tribes in no way restricts the power of Congress to override a state's Eleventh Amendment immunity under the Indian Commerce Clause. To the contrary, the sovereign power of the Indian tribes makes it an even more compelling argument that Congress has the power, under the Indian Commerce Clause, to abrogate a state's claim of sovereign immunity against an Indian tribe.[5]

In overriding the states' Eleventh Amendment immunity when enacting IGRA, Congress was legislating in the field of Indian affairs. Congress clearly had the power to do so under the Indian Commerce Clause and it intended to do so. Indeed, the Indian Commerce Clause provides a stronger basis than the Interstate Commerce Clause for Congress to abrogate State sovereign immunity. In a reaffirmation of an Indian tribe's inherent power of self government, the Supreme Court stated that, absent Congressional action, no state may impose its laws on the reservation. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991). The court of appeals in *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991 (9th Cir. 1994) reasoned, "Congressional power

[5]In *Ramah School Bd. v. Bureau of Rev.*, 458 U.S. 832 (1982), finding that federal law preempted state taxes and that it imposed an impermissible burden on tribal sovereignty, the Supreme Court recognized the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause. *Id.* at 837.

pursuant to the Indian Commerce Clause, then, cannot be less than its authority under the Interstate Commerce Clause." *Id.* at 997. The Ninth Circuit in *Spokane* agreed with the district court judge in the case at bar that, based on its paramount and plenary authority over Indian affairs, Congress' power to act pursuant to the Indian Commerce Clause is at least as great, if not greater than its power under the Interstate Commerce Clause. In fact, the plurality[6] in *Union Gas* speaks in terms of the Commerce Clause as a whole, and that decision was not limited to the Interstate Commerce Clause. *Spokane, supra*, 28 F.3d at 996. Through the Indian Commerce Clause, the states relinquished authority over Indian affairs to the federal government. Pursuant to its plenary[7] power to legislate in the field of Indian affairs, Congress had the power to abrogate the sovereign immunity of the states. With the adoption of the United States Constitution, Indian relations became the exclusive province of federal law, *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 234 (1985), and as a result, the states ceded whatever authority they previously had to regulate Indians affairs.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) the Supreme Court held that Congress could abrogate a state's sovereign immunity when acting pursuant to its plenary authority under §5 of the Fourteenth Amendment. In exercising its power under the Fourteenth Amendment,

[6]"Although Justice Brennan's opinion in *Union Gas* was a plurality opinion, a fifth Justice, Justice White, agreed that states are not immune from suit under statutes enacted pursuant to the Interstate Commerce Clause, provided the Congressional intent is clear." *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991, 996 (9th Cir. 1994).

[7]Plenary does not mean absolute and Congress is, of course, subject to constitutional constraints. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-85 (1977).

Congress was acting pursuant to an amendment of the Constitution whose other sections by their terms embodied limitations of state authority. *Union Gas, supra*, 491 U.S. at 16-17. As noted in *Union Gas*, the Commerce Clause, like the Fourteenth Amendment, gives Congress power while taking it away from the states. The broad grant of power to Congress over Indian affairs necessarily limits the power of the states. *Spokane, supra*, 28 F.3d at 996. Congressional power over Indian Commerce and Interstate Commerce derives from the same clause of the Constitution and Congressional authority to abrogate the State's immunity cannot be less under one clause than the other. Moreover, based on its plenary authority over Indian affairs, Congress' power to act pursuant to the Indian Commerce Clause is at least as great, if not greater than its power under the Interstate Commerce Clause.[8]

Power Under The Interstate Commerce Clause

Congress also had the power under the Interstate Commerce Clause to enact IGRA and to abrogate the State's Eleventh Amendment immunity. For reasons often explained in terms of comity or federalism, power under the Interstate Commerce Clause has not always been given as broad an interpretation as the power to legislate Indian

[8]In fact, the delegation of power to the states to regulate Indian gaming conflicts with the deeply rooted policy of leaving Indians free from states' jurisdiction. *See, e.g., McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168 (1973); *Rice v. Olson*, 324 U.S. 786 (1945). Thus, perhaps the question should be whether Congress had the power at all to enact legislation which allows the states to regulate Indian gaming. Certainly, to delegate such power to the states, pursuant to the request of the states, but at the same time allow the states to invoke sovereign immunity when sued to enforce the requirement to negotiate in good faith, would surrender federal control of Indian matters to the states and, given the express language of the Indian Commerce Clause, raises serious constitutional issues.

commerce and foreign commerce. However, Congress also possesses the power under the Interstate Commerce Clause to abrogate a state's sovereign immunity. In *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279 (1973), the Supreme Court acknowledged that the states surrendered a portion of their sovereignty when they granted to Congress the power to regulate commerce. *Id.* at 286.[9] The power to regulate commerce includes the power to override a state's immunity from suit as long as Congress has expressed an intent to do so. The Eleventh Circuit opinion acknowledged that Congress has the power, under the Interstate Commerce Clause, to abrogate a state's Eleventh Amendment sovereign immunity claim. The Supreme Court has specifically decided this in *Union Gas, supra*, 491 U.S. at 14-15. The Eleventh Circuit simply

[9]Although the Eleventh Circuit opinion rejected the argument that the State may have consented to suit either explicitly, under the "plan of the convention" (by ratifying the Constitution), or by participation in a Congressional program, Amicus Curiae notes that in this case the states not only participated in the enactment of IGRA but they actually pursued it in order to have a voice in regulating Indian gaming and to enforce the states' laws. The states consented to suit by participating in the enactment of IGRA. The Eleventh Circuit rejected the Seminole's reliance on *Parden v. Terminal Railway of Alabama*, 377 U.S. 184 (1964) and concluded that *Parden* was "not quick enough to breath life into the Indian tribes' claims in these cases." Under *Parden*, by entering a field of economic activity that is federally regulated, a state impliedly consents to suit and waives sovereign immunity. The reports of *Parden's* death are greatly exaggerated. The attempt to distinguish *Parden* on the basis that the activity involved there was typical of individuals is too narrow. The states entered into the field of economic activity regarding Indian gaming regulation and indeed sought the enactment of IGRA in order to participate in this economic activity. They have, therefore, waived any immunity they may have had. "Indeed, principles of state sovereignty are singularly out of place in such a scheme where the federal government is tailoring a limited grant of power to the states. In this case, sovereign immunity would undermine rather than promote the assertion of state interests." *Spokane Tribe of Indians v. Washington*, 28 F.3d 991, 997 (9th Cir. 1994).

decided that IGRA was not enacted under the Interstate Commerce Clause. This conclusion is incorrect. Congress had the power to enact IGRA under both the Indian Commerce Clause and the Interstate Commerce Clause.

Congress has the power to abrogate Eleventh Amendment immunity when it is exercising any constitutional provision that gives Congress plenary power over matters affecting the states. *Spokane, supra*, 28 F.3d at 995. The fact that IGRA primarily involves matters relating to Indian tribes does not mean that these matters cannot also involve issues of interstate commerce affecting the states.

IGRA was enacted following the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) which made tribal sovereignty subordinate only to the federal government. Although IGRA reaffirmed the federal interest in providing a means for self-sufficiency and economic development for Indian tribes, it was also a response to concerns of the states which sought a voice in regulating gaming within their borders. Pub.L. 100-497 100th Cong. 2nd Sess. 1988. In fact, IGRA actually provided the states with a role in Indian gaming that they did not possess after the Supreme Court decision in *Cabazon*. Given the involvement of the states in the passage of IGRA, and the policy reasons for its passage, which was the result of a compromise urged by the states, Congress' power under the Interstate Commerce Clause can be relied upon as a basis for overriding the State's sovereign immunity.

In enacting IGRA, Congress tried to fashion a plan that would give the states a voice in how tribal gaming should operate and also a means to enforce the states' own laws. *Spokane, supra*, 28 F.3d at 997. The *Background* of

P.L. 100-497, S.Rep.No.446, 100th Cong. 2d Sess. (1988) specifically notes that state and federal law enforcement officials expressed fear that Indian bingo and other gambling enterprises could become targets for infiltration by criminal elements. S.Rep. 446, *supra* at 1. Although, as noted in the "Additional Views" of Senator McCain in that Senate Report, as the debate on IGRA unfolded it became clear that the interests of the states and of the gaming industry extended far beyond their expressed concern about organized crime and centered more in the protection of their own games from a new source of economic competition, the fact remains that the states made organized crime their motive for seeking the enactment of IGRA and Congress relied on this stated intent in enacting it. 25 U.S.C. §2702(2). Moreover, assuming the states also had an economic interest in urging the enactment of IGRA, it cannot be seriously argued that gaming has no effect on interstate commerce. By its very nature gaming affects commerce between the states. Both the desire to protect gaming from the influences of organized crime, and the economic interest in protecting their own economy, affect interstate commerce.[10]

In a challenge to the power of Congress in enacting the Organized Crime Control Act of 1970, 84 Stat. 922, the Third Circuit Court of Appeals in *United States v. Ceraso*, 467 F.2d 653 (3rd Cir. 1972), rejected the argument that Congress lacked the power to enact the Act. Citing to the evidence given to Congress showing the serious effects of gambling on interstate commerce the court said:

[10]The State attempts to have it both ways. It wants to allow for the power of Congress to enact IGRA to impose the State's regulation on Indian gaming but it does not want to comply with its duty under the Act to negotiate in good faith.

> The Report of the President's Commission on Law Enforcement and Administration of Justice, *supra*, at 188-89 stated that "gambling is the greatest source of revenue for organized crime." It noted that estimates of the total amount bet through organized crime's facilities each year varied from $7 billion to some $50 billion. All of this activity was accomplished by an intricate system of local, regional, and national "lay-off men," who through the use of the facilities of interstate commerce, captured the substantial bankroll which has been used to "infiltrate legitimate businesses and labor unions, to harm investors and competing businesses, and to corrupt the democratic process." *Schneider v. United States*, 459 F.2d 540, at 542 (8th Cir. filed April 12, 1972). As we previously noted, Congress placed great reliance on the report and the findings it contained. We find that this information was a sufficient rational basis for the conclusion that gambling produced serious detrimental effects on interstate commerce. Further, Congress acted within its authority because the means selected for controlling this evil are reasonably related to the effectuation of the end sought to be achieved.

United States v. Ceraso, supra, 467 F.2d at 657-58.

The Organized Crime Control Act set forth Congress' findings about the effects of organized crime on interstate commerce: it is a highly sophisticated and widespread activity that drains the economy by unlawful conduct and illegal fraud and corruption. The Organized Crime Control Act cites gambling as one of the sources from which organized crime derives its power and finds that this power

and money are increasingly used to infiltrate and corrupt legitimate business and corrupt the democratic process:

> [O]rganized crime activities in the United States weaken the stability of the nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce and undermine the general welfare of the nation and its citizens. . .

467 F.2d at 658 n.7

In *United States v. Sacco*, 491 F.2d 995 (9th Cir. 1974) (*en banc*), the appellants challenged 18 U.S.C. §1955 stating that its prohibition of illegal gambling businesses regulated purely local activity and had no effect on interstate commerce. The Ninth Circuit rejected that argument stating that although an activity is local and not regarded as commerce, it can be reached by Congress if it exerts a substantial economic effect on interstate commerce. *See also, Perez v. United States*, 402 U.S. 146 (1971) (Loan sharking operations are carried on, to a substantial extent, in interstate and foreign commerce, and through the means and instrumentalities of such commerce, and even where extortionate credit transactions are purely intrastate in character, they nevertheless affect interstate and foreign commerce). The class of activities which Congress intended to regulate under IGRA burdens interstate commerce. Congress has found that gambling is one of the sources from which organized crime derives its power. Therefore, Congress had a rational basis to find that the regulated activity affected commerce and the regulatory scheme provided by IGRA is reasonable. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

The legislative history of IGRA is replete with references to Congress' concern over the infiltration of organized crime into tribal gaming operations. *See, e.g.*, S.Rep. No. 446, 100th Cong., 2d Sess. 1, 5 (1988). Congress enacted IGRA not only to ensure tribal self-sufficiency, because this was assured to Indian tribes by *Cabazon* and its limits on a state's authority, but also to protect gaming from the corrupting influences of organized crime. Because the stated policy in enacting IGRA was, in large part, to provide a statutory basis for the regulation of gaming by Indian tribes, to shield the gaming from organized crime and other corrupting influences, to ensure that the Indian tribes were the primary beneficiaries of the gaming operation and to also ensure that gaming was conducted fairly and honestly, this policy gives Congress the power under the Interstate Commerce Clause to abrogate the state's sovereign immunity.

b. Congress Intended To Abrogate Eleventh Amendment Immunity By Enacting The Indian Gaming Regulatory Act.

The Eleventh Circuit Court of Appeals in its opinion recognized that Congress intended to abrogate the State's sovereign immunity when it enacted IGRA. *Seminole Tribe v. Florida, supra*, 11 F.3d at 1024. Congress may abrogate the State's Eleventh Amendment immunity from suit only when the Congressional intent to abrogate that immunity is unequivocal. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). (Congress has power to abrogate state immunity when acting pursuant to §5 of the Fourteenth Amendment); *see also, Union Gas, supra*, 491 U.S. at 7 (Congress must make its intent to override a state's immunity unmistakably clear); *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) (same). In enacting IGRA Congress gave federal district courts jurisdiction "over three types of

cases, the first of which is 'any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith.' The only possible defendant to such a suit is a state." *Seminole Tribe of Florida v. State of Florida, supra*, 11 F.3d at 1024 (citations omitted). It is clear that Congress intended to abrogate the state's sovereign immunity when it enacted IGRA. The question is not whether Congress intended to abrogate sovereign immunity when it enacted IGRA, and respondent conceded as much, *Seminole Tribe v. Florida*, 801 F. Supp. at 658, referring to the State's Memorandum at 1, but whether Congress had the power to abrogate the State's Eleventh Amendment. Congress had such power under the Indian Commerce Clause as well as under the Interstate Commerce Clause.

III.

EX PARTE YOUNG AUTHORIZES THE SEMINOLE TRIBE'S FEDERAL CLAIMS AGAINST STATE OFFICIALS FOR PROSPECTIVE RELIEF.

The Eleventh Amendment does not prohibit suits against state officials based upon violations of federal law when only prospective injunctive and declaratory relief is sought. *Green v. Mansour*, 474 U.S. 64, 68 (1985). The Seminole Tribe's lawsuit against the Governor of the State of Florida, Lawton Chiles, properly sought to invoke the doctrine of *Ex parte Young* and force the state officials to negotiate in good faith. Under IGRA, state officials are required to conduct negotiations for Class III gaming in good faith, and the Act creates a cause of action which gives the federal court jurisdiction for failure of a state to

enter into negotiations, or to conduct such negotiations in good faith. 25 U.S.C. §2710 (d) (7) (A) (i).

Sovereign immunity does not preclude a suit against a state official for prospective relief designed to vindicate federal law. *Pennhurst State School and Hosp., v. Halderman*, 465 U.S. 89, 104-06 (1984). Petitioner sought to require the Governor of the State of Florida to negotiate a compact in good faith and asked for declaratory relief. The Governor is the official in the State of Florida authorized to negotiate on behalf of the state, therefore, the prospective relief requested by Petitioner clearly falls within the doctrine of *Ex parte Young*. *Pennhurst State School & Hosp., supra*, 465 U.S. at 102-03. If a suit seeks prospective relief against a state official to vindicate federal law, it is permitted under *Ex parte Young* notwithstanding the impact on the state itself. *Id.* at 104.

Moreover, the Eleventh Circuit incorrectly held that the actions of the State involved discretionary acts. The State is required to negotiate in good faith and has no discretion to decline to do so. 25 U.S.C. §2710(d)(3)(A). If the state official declines to negotiate at all, there are procedures in IGRA which prescribe the process for regulating the Class III gaming. Because the State of Florida opted to negotiate with Petitioner, it was required to negotiate in good faith; this was not discretionary. It was only the decision to negotiate at all which was discretionary.

Under *Ex parte Young*, the State's assertion of sovereign immunity to bar the lawsuit by Petitioner must fail. Even if the Court were to decide that the Eleventh Amendment bars a lawsuit by a citizen against his own state, based on the need to promote the supremacy of

federal law, *Pennhurst State School and Hosp., supra*, 465 U.S. at 105, such immunity would not apply here.

CONCLUSION

For the reasons stated above, Amicus Curiae, the Miccosukee Tribe of Indians of Florida, supports the Petitioner, the Seminole Tribe of Florida, in its request to reverse the judgment of the Eleventh Circuit Court of Appeals.

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SEMINOLE TRIBE OF FLORIDA,
Petitioner,

VS.

STATE OF FLORIDA, ET AL.,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

Brief of *Amici Curiae* San Manuel Band of Mission Indians, Rumsey Indian Rancheria of Wintun Indians, Jackson Rancheria Band of Miwuk Indians, Table Mountain Rancheria of California, Table Bluff Reservation of Wiyot Indians of California, Guidiville Band of Pomo Indians of the Guidiville Rancheria and Viejas Band of Kumeyaay Indians

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OTHER AUTHORITIES

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No. 94-12

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

VS.

STATE OF FLORIDA, ET AL.,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

Brief of *Amici Curiae* San Manuel Band of Mission Indians, Rumsey Indian Rancheria of Wintun Indians, Jackson Rancheria Band of Miwuk Indians, Table Mountain Rancheria of California, Table Bluff Reservation of Wiyot Indians of California, Guidiville Band of Pomo Indians of the Guidiville Rancheria, and Viejas Band of Kumeyaay Indians

I.
Interest of Amici Curiae

This brief of amici curiae San Manuel Band of Mission Indians, Rumsey Indian Rancheria of Wintun Indians, Jackson Rancheria Band of Miwuk Indians, Table Mountain Rancheria of California, Table Bluff Reservation of Wiyot Indians of California, Guidiville Band of Pomo Indians of the Guidiville Rancheria, and Viejas Band of Kumeyaay Indians (hereinafter collectively the "Tribes"),

is filed in support of petitioner Seminole Tribe of Florida pursuant to the written consent of all parties. The Tribes are all federally recognized Indian tribes whose reservations are located within the geographical boundaries of the State of California. Many of the amici Tribes depend on gaming on their reservations for tribal governmental revenue and to promote tribal economic development, tribal self-sufficiency, and strong tribal governments. Several other amici Tribes are in the process of developing gaming on their reservations to achieve these benefits. If states are permitted to assert a sovereign immunity defense to actions brought to enforce tribes' rights under the Indian Gaming Regulatory Act, 25 U.S.C. sections 2701-21 (hereinafter "IGRA" or the "Act"), the Tribes believe they will be prevented from realizing the tribal self-sufficiency and economic development Congress intended IGRA to afford.

II.
Summary of Argument

This brief examines Congress' power to abrogate the states' sovereign immunity when legislating under the Indian and interstate commerce clauses, and argues that Congress clearly and successfully exercised such power in IGRA.

In *Chisholm v. Georgia*, 2 U.S. (Dall.) 419 (1793), the Court misconstrued Article III as providing a blanket waiver of the states' immunity. The Eleventh Amendment corrected *Chisholm*'s error, instructing federal courts that Article III was not to be construed as waiving the states' immunity. In doing so, the Eleventh Amendment necessarily recognized the existence of that immunity, which is an inherent component of the states' common law sovereignty.

The Amendment did not, however, render the states' immunity inviolable. A state's assertion of immunity in any given instance is still open to challenge, requiring a determination of whether it can be overcome by a meritorious claim of consent, which may be manifested either directly, by means of a waiver, or, as in the case of Congress' abrogation pursuant to the exercise of its plenary powers, through the plan of the convention. *See, e.g., Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 779, 111 S.Ct. 2578, 2581 (1991); *Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 310-11, 110 S.Ct. 1868, 1875 (1990) (Brennan, J., concurring); *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468, 474, 107 S.Ct. 2941, 2946 (1987) (Powell, J.). While the states did not cede their sovereignty — or its corollary immunity — to tribes under the plan of the convention, *Blatchford*, 501 U.S. at 775, 11 S.Ct. at 2578, the states did cede their sovereignty to the federal government to the extent necessary for Congress to effectuate its constitutional powers. *See, e.g., Monaco v. Mississippi*, 292 U.S. 313, 322-23, 54 S.Ct. 745, 747-48 (1934). The existence and recognition of those powers — here, the Indian and interstate commerce clauses — supports the conclusion that Congress successfully abrogated state immunity in IGRA to either: (1) implement a court-supervised scheme to move IGRA's class III compact process into a meaningful negotiating environment between tribes and states; or (2) to determine that a state has no interest in further participation and direct the tribe to seek class III rules from the Secretary of the Interior.

When Congress clearly states its intent to abrogate state immunity — as it unmistakably did in IGRA — and legislates pursuant to its plenary powers over Indian and interstate commerce, the claim of abrogation overcomes a state's immunity defense. This is particularly true where, as in IGRA, the statute only abrogates the states' immunity to determine the posture of the parties or, at best, to provide equitable relief with respect to prospective federal procedures. Nothing in the text, history, or this Court's interpre-

tation of the Eleventh Amendment suggests that under those circumstances the states' immunity would have inviolable constitutional protection.

Prior to IGRA, states played virtually no role in regulating Indian gaming. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 210-11, 107 S.Ct. 1083, 1089 (1987). After forcefully and successfully lobbying Congress, states won the right in IGRA to participate, through good faith negotiations with tribes, in regulating Indian gaming under the mechanism of Tribal-State compacts. Congress recognized, however, the virtual veto power IGRA could give to states over class III gaming if compacts are required without some safeguards against negotiating impasses. Federal court supervision in the event the negotiating process stalled — or worse, was never begun — was the reasonable answer Congress chose. That way, if a state elected not to negotiate, or did so on a basis which was determined to be overreaching or unreasonable, and persisted in maintaining that posture, the tribe could be freed of the compact requirement and could turn to the Secretary of the Interior for compact-equivalent procedures. *See* 25 U.S.C. § 2710(d)(7)(B).

Under IGRA, states are under no obligation to regulate Indian gaming or appear in federal court to defend against a tribal claim of failure to negotiate, or bad faith negotiation, if the state does not wish to do so. *The availability of a federal forum under IGRA is solely for the state's protection to determine, in a way that assures due process to the state but obviously provides nothing to the Tribe except further delay, whether in fact the state desires to negotiate a compact with the Tribe.* IGRA provides no penalty whatsoever for states that decline the Act's regulatory or judicial invitations. The compact process represents an opportunity for the states to expand the scope of their sovereign powers rather than an intrusion on those powers as the Eleventh

Circuit held. The lack of such an intrusion and the paramount need for Congress to be able to move its chosen process along — and in doing so to fulfill its mandate to regulate Indian gaming — sufficiently supports congressional authority to abrogate state immunity.

Moreover, even if the Court were to balance federal and state interests to determine whether Congress had the power to abrogate the states' sovereign immunity in IGRA, Congress' abrogation power must be upheld. First, the federal government's interest in preserving peace among the sovereigns existing within its borders requires IGRA's abrogation of state immunity. Second, the federal government's interest in promoting Indian self-sufficiency, and the rationale of *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634 (1976), also compels abrogation of state immunity. Third, the federal government's trust responsibility to Indian tribes demands that any abrogation of immunity in IGRA apply equally to states and tribes. Fourth, no special justification exists in this case to deviate from this Court's numerous decisions which have both held and assumed that Congress' plenary Article I powers are sufficient to overcome the states' sovereign immunity, given a clear expression of congressional intent. Finally, the states' minimal interest, if any, in regulating activities in Indian country were more than adequately protected in this case by the national political process.

For all of these reasons, amici curiae Tribes submit that the Indian and interstate commerce clauses empower Congress to subject the states to suit in federal court for the limited purpose of determining which forum — negotiations with states or consultations with the Secretary of the Interior — tribes will be directed to in pursuing the gaming activities Congress envisioned under the Act. Amici respectfully request that the Court reverse the Eleventh Circuit's

opinion and judgment, which is reported at 11 F.3d 1016 (11th Cir. 1994).

III.
Argument

A. IGRA Unmistakably Subjects States to Suit in Federal Court

Beginning with *Employees of the Dep't of Pub. Health and Welfare v. Dep't of Pub. Health and Welfare*, 411 U.S. 279, 93 S.Ct. 1614 (1973), this Court has consistently applied the "clear statement" rule to determine whether or not Congress intended to abrogate state sovereign immunity in a particular statute. The Court has required that Congress express its intention to abrogate state immunity "in unmistakable language in the statute itself." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243, 105 S.Ct. 3142, 3148 (1985). *See also Welch v. State Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 474, 107 S.Ct. 2941, 2996 (1987). Without such a clear statement of congressional intent, questions concerning the validity of Congress' exercise of its abrogation power are moot. While Congress' intent must be unmistakably clear, it need not use magic words — that is, the standard "does not preclude congressional elimination of sovereign immunity in statutory text that clearly subjects states to suit for monetary damages, though without explicit reference to state sovereign immunity or the Eleventh Amendment." *Dellmuth v. Muth*, 491 U.S. 223, 233, 109 S.Ct. 2397, 2403 (1989) (Scalia, J., concurring).

IGRA unmistakably provides Tribes with a federal claim for equitable relief against states that have either failed to participate in class III negotiations or have done so in bad faith:

> The United States district court shall have jurisdiction over — (i) any cause of action initiated by an Indian tribe arising from the failure of a state to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith.

25 U.S.C. § 2710 (d)(7)(A)(i).[1] The Act also provides evidentiary thresholds relating to (1) failing to reach a compact within 180 days, or (2) failing to respond to a request for compact negotiations, or not responding in good faith. *See* 25 U.S.C. § 2710(d)(7)(B). Upon showing any of the foregoing, the burden shifts to the state to prove its good faith. *Id.*[2] Thus, IGRA provides not only federal

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[1] Section 2710(d)(7)(A) provides for federal jurisdiction over three types of lawsuits:

> The United States district court shall have jurisdiction over —
>
> (i) any cause of action initiated by an Indian tribe arising from the failure of a state to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
>
> (ii) any cause of action initiated by a state or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and
>
> (iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

25 U.S.C. § 2710 (d)(7)(A).

[2] IGRA's Senate Report provides Congress' rationale for subjecting states to suit:

> Section 11(d)(7) grants a tribe the right to sue a state if compact negotiations are not concluded. This section is the result of the Committee balancing the interests and rights of tribes to engage in

jurisdiction over actions against states, but sets forth the elements of, and evidentiary standards for, such suits. *See* 25 U.S.C. § 2710(d)(7).

The court below correctly recognized that Congress clearly intended to subject the states to suit in federal court under IGRA. *See Seminole Tribe of Florida*, 11 F.3d 1016, 1024 (11th Cir. 1994). Every other federal court to address the issue has reached the same conclusion. *See Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422, 1428 (10th Cir. 1994); *Spokane Tribe of Indians v. Washington*, 28 F.3d 991, 994-95 (1994); *Ponca Tribe of Oklahoma v. Oklahoma*, 834 F. Supp. 1341, 1345 (W.D. Okla. 1992); *Kickapoo Tribe of Indians v. Kansas*, 818 F. Supp. 1423, 1427 (D. Kan. 1993); *Sault Ste. Marie Tribe of Chippewa Indians v. State*, 800 F. Supp. 1484, 1488-89 (W.D. Mich. 1992); *Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550, 558 (S.D. Ala. 1991). *See also Willis v. Fordice*, 850 F. Supp. 523, 530 (S.D. Miss.1994) (assuming

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gaming against the interests of states in regulating such gaming. Under this act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve state jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated. In contrast, states are not required to forgo any state governmental rights to engage in or regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact. Thus, given this unequal balance, the issue before the Committee was how best to encourage states to deal fairly with tribes as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a state if a compact is not negotiated and chose to apply the good faith standard as the legal barometer for the state's dealings with tribes in class III gaming negotiations.

S. Rep. No. 446, 100th Long., 2d Sess., 1, 14 (1988) *reprinted in* 1988 U.S. Code Long & Admin. News 3071, 3084 (hereinafter "Senate Report").

validity of IGRA's provisions for federal jurisdiction over suits against the states).

The unmistakable clarity with which Congress expressed its intent in IGRA to submit the states to federal court jurisdiction is distinguishable from the statutes which have been at issue in many of the leading Eleventh Amendment cases. *Cf. Blatchford*, 501 U.S. 775, 111 S.Ct. 2578 (interpreting 28 U.S.C. § 1362); *Dellmuth*, 491 U.S. 223, 109 S.Ct. 2397 (interpreting the Education of the Handicapped Act, 20 U.S.C. § 1400, *et seq.*); *Atascadero*, 473 U.S. at 245, 105 S.Ct. at 3149 (interpreting the Rehabilitation Act, 29 U.S.C. § 794a(a)(2)); *Employees*, 411 U.S. 279, 93 S.Ct. 1614 (interpreting the Fair Labor Standards Act, 29 U.S.C. § 216(b)).

In *Spokane Tribe*, the Ninth Circuit explained that:

> The tribe's suit and the federal court's jurisdiction are triggered under [section 2710(d)(7)(A)(i)] by the particular state's failure to negotiate in good faith. *The state is the only possible defendant to such a suit, and it is the only other party to the compact negotiations.* Congress fully contemplated and expressed its desire to give the tribes a federal forum by which they could compel the states to negotiate fairly with them. This is not just a permissible inference; it is the only reasonable inference .... *Short of mentioning the Eleventh Amendment or sovereign immunity, a clearer statement of the intent to abrogate is difficult to envision.*

Spokane Tribe of Indians, 28 F.3d at 995 (*quoting Kickapoo Tribe*, 818 F. Supp. at 1427) (emphasis added). Given the clarity of Congress' intention to abrogate state sovereign immunity, the question is whether, in enacting IGRA, it was empowered to do so.

B. The Eleventh Amendment Reflects The States' Common Law Sovereign Immunity But Creates No New Substantive Rights

The immunity at issue here is fundamental to the nature of states as political entities: "[A] state's immunity from suit by a citizen without its consent has been said to be rooted in 'the inherent nature of sovereignty . . . .'" *Parden v. Terminal Railway of the Alabama State Docks Dept.*, 377 U.S. 184 191, 84 S.Ct. 1207, 1212 (1964) (*quoting Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 51, 64 S.Ct. 873, 875 (1944)). "[T]he doctrine of sovereign immunity, for states as well as for the Federal Government, was part of the understood background against which the Constitution was adopted . . ." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 31-32, 109 S.Ct. 2273, 2297 (1989) (Scalia, J., concurring in part and dissenting in part).

Article III's grant of judicial power over suits "between a state and Citizens of another state," initially raised doubts about the continued existence of state sovereign immunity. *See* U.S. Const., art. III, § 2.[3] In *Chisholm*, the Court read Article III as if it constituted a general waiver of the states' sovereign immunity. *Chisholm* was reversed with "vehement speed" by the Eleventh Amendment.[4] *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 708, 69 S.Ct. 1457, 1470 (1949). Having been misinterpreted by *Chisholm*, Article III's original meaning was restored by the Eleventh Amendment: "The Eleventh Amendment served effectively to reverse the particular holding in *Chisholm*, and, more generally to restore the original understanding," namely, that the states retained their sovereignty in those areas not delegated to the federal government. *Employees*, 411 U.S. 279, 291-92, 93 S.Ct. 1614, 1621 (1973) (Marshall, J., concurring). *See also Edelman v. Jordan*, 415 U.S. 651, 662, 94 S.Ct. 1347, 1355 (1974) ("Sentiment for passage of a constitutional amendment to override the decision rapidly gained momentum, and five years after *Chisholm* the Eleventh Amendment was officially announced by President John Adams").

[3] Article III, section 2 provides:

> The judicial Power shall extend to all Cases, In Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party; to Controversies between two or more states; between a state and Citizens of another state; between Citizens of different states; between Citizens of the same state claiming Lands under Grants of different states, and between a state, or the citizens thereof, and foreign states, Citizens or Subjects.

U.S. Const., art. III, § 2.

[4] The Eleventh Amendment provides that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by Citizens or subjects of any foreign state."

Article III — both before *Chisholm* and after the Eleventh Amendment — merely allows federal courts to hear suits involving a state when such suits are otherwise cognizable. But in determining the scope of what is cognizable, arguments that the classifications of cases enumerated in either Article III or the Eleventh Amendment are limiting factors generally have been rejected. *See Hans v. Louisiana*, 134 U.S. 1, 14, 10 S.Ct. 504, 507 (1890) (Article III, section 2 " 'can have no operation but this: to give a citizen a right to be heard in the federal courts, and, if a state should condescend to be a party, this court may take cognizance of it' ") (*quoting* Madison in 3 Elliot, Debates, 533). Thus the Court has recognized that:

> Despite the narrowness of its terms, since *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed.2 842 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, *but for the presupposition of our constitutional structure which it*

> *confirms:* that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty (citations) . . . and that a State will therefore not be subject to suit in federal court *unless it has consented to suit, either expressly or in the "plan of the convention.*

Blatchford, 501 U.S. at 799, 111 S.Ct. at 2581 (emphasis added).

Indeed, this Court has consistently held that: (1) the Eleventh Amendment "confirms,"[5] "exemplifi[es],"[6] and "affirm[s],"[7] the fundamental principle that state sovereign immunity survived the states' ratification of the Constitution; (2) Article III's grant of judicial authority is limited by that immunity; and (3) the immunity cannot be overcome unless the state has consented to suit or Congress has abrogated state immunity in unmistakenly clear language. *Union Gas*, 491 U.S. at 7, 109 S.Ct. at 2277 (Brennan, J., plurality). Those are the fundamentals "reflected" in, *though not created by*, the Eleventh Amendment. *Id.* Indeed, because the Eleventh Amendment itself may be viewed as simply reflecting the states' common law immunity, rather than giving birth to a new immunity, it therefore may be a misnomer to refer, as is common, to an "Eleventh Amendment immunity" or an "Eleventh Amendment defense." *See, e.g., Quern v. Jordan*, 440 U.S. 332, 343, 99 S.Ct. 423, 425 (1985); *Delmuth*, 491 U.S. at 225, 109 S.Ct. at 2398. All that is really meant by such references is that the state has asserted its common law immunity from suit under its sovereign powers reflected in the Eleventh Amendment; no more, no less. The Eleventh Amendment thus

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[5] *Blatchford*, 501 U.S. at 799, 111 S.Ct. at 2581.

[6] *Ex Parte New York*, 256 U.S. 490, 497, 41 S.Ct. 588, 589 (1921).

[7] *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 906-07 (1984).

serves as a shorthand reference to the states' traditional defense of sovereign immunity. Put another way, the Eleventh Amendment only addresses a subset of the entire set of cases in which states may have a sovereign immunity defense. For this reason, Hans and its progeny do not rely solely on the Eleventh Amendment's narrow terms, but instead rest on the broad concept of common law sovereign immunity of which the Amendment is but a reflection:

> [I]n the landmark case of *Hans v. Louisiana*, the Court unanimously rejected this "comprehensive" approach to the [Eleventh] Amendment, finding sovereign immunity where not only a nondiversity basis of jurisdiction was present, *but even where the parties did not fit the description of the Eleventh Amendment*, the plaintiff being a citizen not of another state or country, but of Louisiana itself. What we said in *Hans* was, essentially, that *the Eleventh Amendment was important not merely for what it said but for what it reflected*: a consensus that the doctrine of *sovereign immunity, for states as well as for the Federal Government, was part of the understood background against which the Constitution was adopted*, and which its jurisdictional provisions did not mean to sweep away.

Union Gas, 491 U.S. at 31-32, 109 S.Ct. at 2297 (Scalia, J., concurring in part and dissenting in part) (emphasis added).

Thus, while the Eleventh Amendment reflects the states' common law sovereign immunity, it does create any new substantive rights.

C. The States Surrendered Their Sovereignty Over Indian and Interstate Commerce to the Federal Government Under the Plan of the Convention

It is well-settled that by ratifying the Constitution the states surrendered their common law sovereignty in areas

where Congress was granted express plenary powers. "States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, *save where there has been 'a surrender of this immunity in the plan of the convention.'*" *Monaco v. Mississippi*, 292 U.S. 313, 322-323, 54 S.Ct. 745, 747-48 (1934) (*quoting* The Federalist, No. 81) (emphasis added). *See also, Union Gas*, 491 U.S. at 33, 109 S.Ct. at 2298 (Scalia, J., concurring in part and dissenting in part) (*quoting Monaco*); *Parden*, 377 U.S. at 191, 84 S.Ct. at 1212 (1964) ("the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce").[8]

In his famous dissent in *Chisholm*, Justice Iredell drew the line demarcating the portion of sovereignty the states surrendered from that which they retained:

> Every state in the Union in every instance *where its sovereignty has not been delegated to the United States*, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. *The United States are sovereign as to all the powers of Government actually surrendered.* Each state in the Union is sovereign as to all the powers reserved.

Chisholm, 2 U.S. at 435 (Iredell, J., dissenting) (emphasis added). Thus Justice Iredell recognized that the states surrendered their sovereignty as to those powers expressly delegated to the Federal Government. Thirty years after *Chisholm*, the Court confirmed Justice Iredell's view. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In *Gibbons*, the Court recognized that the states' surrender of sovereignty specifically encompassed the interstate commerce power:

> If, as has always been understood, the sovereignty of Congress, though limited to specified objects is plenary as to those objects, the power over commerce . . . among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.

Gibbons, 22 U.S. at 197. Similarly, in *Parden*, the Court recognized that "[b]y empowering Congress to regulate commerce . . . the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." *Parden*, 377 U.S. at 192, 84 S.Ct. at 1212. And in *Employees*, Justice Marshall noted that:

> The common-law doctrine of sovereign immunity in its original form stood as an absolute bar to suit against a state by one of its citizens, absent consent. But that doctrine was modified *pro tanto* in 1788 to the extent that the states relinquished their sovereignty to the Federal Government. At the time our Union was formed, the states, for the good of the whole, gave certain powers to Congress, including power to regulate commerce, and by so doing, they simultaneously subjected to congressional control that portion of their pre-existing common-law sovereignty which conflicted with those supreme powers given over to Congress.

Employees, 411 U.S. at 288, 93 S.Ct. at 1620 (Marshall, J., concurring).

It is well-settled that Congress has plenary power over both Indian and interstate commerce. *See Quill Corp. v. North Dakota*, ___ U.S. ___, 112 S.Ct. 1904, 1909 (1992) (interstate); *Blatchford*, 501 U.S. at 791, 111 S.Ct.

[8] Similarly, IGRA's Senate Report "recognize[d] and affirm[ed] the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished." Senate Report at 5 (Additional Views of Mr. McLain).

at 587 (Indian); *Hodel v. Indiana*, 452 U.S. 314, 324, 101 S.Ct. 2376, 2383 (1981) (interstate); *Morton v. Mancari*, 417 U.S. 535, 551-52, 94 S.Ct. 2474, 2483-84 (1974) (Indian). The totality of the states' surrender of sovereignty over Indian and interstate commerce is apparent in light of the so-called "dormant" commerce clause. Article I, section 8, clause 3 of the Constitution is phrased as an affirmative grant of power to the federal government over commerce: it does not express any limitations whatsoever on the states' power to regulate commerce concurrently with the federal government. *Cf.* U.S. Const., art. I, § 9, cl. 5 (flatly prohibiting states from imposing export duties). Most of Congress' powers do not preclude concurrent state regulation, absent conflicting federal regulation. *See, e.g., Kewanee Oil Co v. Bicron Corp.*, 416 U.S. 470, 94 S.Ct. 1879 (1974) (Congress' power to issue patents does not bar states from granting different protection to inventors). In the area of commerce, however, the Court has often stricken state statutes regulating commerce even absent a conflicting federal statute. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 102 S.Ct. 2629 (1982); *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 100 S.Ct. 2009 (1980); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 97 S.Ct. 2434 (1977); *A&P Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 96 S.Ct. 923 (1976); *Dean Milk Co. v. Madison*, 340 U.S. 349, 71 S.Ct. 295 (1951); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S.Ct. 1515 (1945); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497 (1935).

In sum, there can be little doubt that by ratifying the Constitution the states surrendered their common law sovereign powers to the Federal Government in the areas of Indian and interstate commerce.

D. Congress Clearly Had the Power to Abrogate State Immunity in IGRA in Order to Effectuate Its Indian and Interstate Commerce Clause Authority

IGRA authorizes federal courts to hear three types of actions: (1) suits by Indian tribes against states for failing to negotiate a Tribal-State compact, or for failing to negotiate in good faith, *see* 25 U.S.C. § 2710(d)(7)(A)(i); (2) suits by states or tribes to enjoin class III gaming activity conducted in violation of a Tribal-State compact, *see id.* at § 2710(d)(7)(A)(ii); and (3) suits by the Secretary of the Interior to enforce procedures for class III gaming where the state has declined to consent to a Tribal-State compact selected through IGRA's mediation process, *see id.* at § 2710(d)(7)(A)(iii). Only the first category of suits is in issue here.

In light of Congress' unmistakable intent to abrogate state immunity in IGRA, and given the states total surrender of sovereignty over Indian and interstate commerce, discussed *supra* at sections III(A) and (C) of this brief, the question of Congress' power to authorize such suits becomes simply one of whether Congress' Article I powers are sufficient to support the statute. Although the Eleventh Circuit held that Congress only enacted IGRA under its Indian Commerce Clause power, and not its Interstate Commerce Clause power, the amici Tribes believe that both powers support the Act. *See* Brief of Amici Curiae National Indian Gaming Association, Minnesota Indian Gaming Association and California-Nevada Indian Gaming Association (interstate). *See also* Brief of Amici Curiae Stockbridge-Munsee Indian Community and the Oneida Nation of Wisconsin (Indian). Given Congress' plenary powers over Indian and interstate commerce, there can be little doubt that Congress had the authority to promulgate IGRA and impose its unique judicial remedies, particularly since those remedies are critical to the successful operation of gaming under the Act. More-

over, those remedies — which are limited to prospective equitable relief, *see* Brief of Amicus Poarch Band of Creek Indians — are designed primarily, if not solely, for the states' protection: that is, IGRA ensures that the states are afforded every opportunity to negotiate for regulatory authority over class III gaming which may impact commerce within their borders.

IGRA demonstrates congressional action in furtherance of its plenary powers over Indian and interstate commerce, which alone is sufficient to support the abrogation invoked under the Act. However, a more moderate approach to determining whether or not the exercise of congressional plenary powers is sufficiently compelling to overcome a state's inherent immunity — by weighing and balancing competing state and federal interests, *see, e.g, Union Gas*, 491 U.S. at 25-29, 109 S.Ct. 2287-89 (Stevens, J., concurring) — also leads to the conclusion that Congress had sufficient authority to abrogate state immunity under the Act. The amici Tribes submit that under IGRA there can be no doubt about Congress' power to abrogate state immunity even if a balancing test is imposed.

E. Any Balancing of Federal and State Interests to Determine Whether Congress Has the Power to Abrogate the States' Sovereign Immunity Must be Concluded in Petitioner's Favor

This Court has acknowledged that sovereign immunity under the Eleventh Amendment is not an absolute bar to federal court jurisdiction over suits against the states: "The Court has recognized certain exceptions to the reach of the Eleventh Amendment." *Welch*, 483 U.S. at 473, 107 S.Ct. at 2946 (Powell, J., plurality). *See also Atascadero State Hospital*, 473 U.S. at 238, 105 S.Ct. at 3145 (noting "well-established exceptions" to the Eleventh Amendment). These exceptions include cases involving: (1) waiver by a

state; *see, e.g., Atascadero State Hospital*, 473 U.S. at 238-39, 105 S.Ct. at 3145-46; *Parden*, 377 U.S. at 186, 84 S.Ct. at 1210; *Clark v. Barnard*, 108 U.S. 436, 447, 2 S.Ct. 878, 883 (1883); (2) prospective equitable relief; *see Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908); *Edelman*, 415 U.S. at 663-64, 94 S.Ct. at 1356; *Green v. Mansour*, 474 U.S. 64, 106 S.Ct. 423 (1986); and (3) congressional abrogation in clear, unmistakable language; *see Union Gas*, 491 U.S. at 14-23, 109 S.Ct. at 2281-86 (Brennan, J., plurality); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 459, 96 S.Ct. 2666, 2673 (1976).

Because the Eleventh Amendment "implicates the fundamental constitutional balance between the Federal Government and the states," *Atascadero State Hospital*, 473 U.S. at 238, 105 S.Ct. at 3146, the Court has often weighed and balanced competing federal and state interests. *See Union Gas*, 491 U.S. at 25-29, 109 S.Ct. 2287-89 (Stevens, J., concurring). *See also Hutto v. Finney*, 437 U.S. 678, 691, 98 S.Ct. 2565, 2573-74 (1978). Thus the Court has recognized that the fiction of *Ex parte Young* "rests on the need to promote the vindication of federal rights . . . " *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104-106, 104 S.Ct. 900, 910-11 (1984). Similarly, *Edelman* involved an effort to "accommodate" the need for vindication of federal rights to the competing interest in the "immunity of the states." *Pennhurst*, 465 U.S. at 105, 104 S.Ct. at 910. And in Green, the Court explained:

> Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interests in assuring the supremacy of that law. But compensatory or deterrence

> interests are insufficient to overcome the dictates of the Eleventh Amendment.

Green, 474 U.S. at 68, 106 S.Ct. at 426 (citations omitted).

A brief review of the facts in *Edelman* may help illustrate the amici Tribes' point. *Edelman* was a class action against the state officials who administered federally-funded programs of Aid to the Aged, Blind or Disabled ("AABD"). The complaint charged that the state defendants improperly omitted certain eligibility months for which applicants were entitled to aid under federal law, and that the defendants did not timely process applications as required by federal regulations. While the complaint purportedly sought only declaratory and injunctive relief, that relief in effect included retroactive damages, for the prayer sought " 'a permanent injunction enjoining the defendants to award to the entire class of plaintiffs all AABD benefits wrongfully withheld.' " 415 U.S. at 656, 94 S.Ct. at 1352 (*quoting* complaint). The district court found for plaintiffs, issued "a permanent injunction requiring compliance with the federal time limits for processing and paying AABD applicants," and also ordered the defendants to retroactively pay the wrongfully-withheld benefits. 415 U.S. at 656, 94 S.Ct. at 1352. The Seventh Circuit affirmed. 472 F.2d 985 (7th Cir. 1973).

This Court recognized that prospective equitable relief was properly granted under *Ex parte Young*, but reversed the grant of retroactive payment of benefits. *Edelman*, 415 U.S. at 659, 94 S.Ct. at 1354. The Court found that "[t]he funds to satisfy the award in this case must inevitably come from the general revenues of the state of Illinois, and thus the award resembles far more closely the monetary award against the state itself, *Ford Motor Co. v. Department of Treasury, supra*, than it does the prospective injunctive relief awarded in *Ex parte Young*." *Id.* at 665, 94 S.Ct. at 1357.

The Court candidly acknowledged that the "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." *Id.* at 667, 94 S.Ct. at 1357. The relief approved in *Ex parte Young* itself had an "effect on the state's revenues . . . [and] [l]ater cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*." *Id.* at 667, 94 S.Ct. at 1357-58 (*citing Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970)). These impacts on the states' treasuries were acceptable because they were ancillary consequences of federal supremacy:

> [T]he fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young, supra*.

Edelman, 415 U.S. at 667-68, 94 S.Ct. at 1358.

Finally, the Court also employed this balancing approach in *Employees*, which was a suit by state employees against the Missouri Department of Public Health & Welfare for overtime compensation under the Fair Labor Standards Act of 1938, 29 U.S.C. section 216(b). The Court recognized that Congress intended to "bring under the Act employees of [state] hospitals and related institutions." *Employees*, 411 U.S. at 283, 93 S.Ct. at 1617. Yet the Court also found no evidence that Congress intended "to make it possible for

a citizen of that state or another state to sue the state in the federal courts." *Id.* at 285, 93 S.Ct. at 1618. The Court was thus unwilling "to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired silently to deprive the states of an immunity they have long enjoyed under another part of the Constitution." *Id.* at 285, 93 S.Ct. at 1618.

Even absent clear statutory language submitting the states to suit in federal court, the Court nevertheless carefully balanced the competing federal and state interests in reaching its conclusion. Significantly, the Court noted that "[b]y holding that Congress did not waive the sovereign immunity of the states under the FLSA, we do not make the extension of coverage to state employees meaningless." *Id.* The Court explained that the section 16(c) of the FLSA "gives the Secretary of Labor authority to bring suit for unpaid minimum wages or unpaid overtime compensation under the FLSA . . . The policy of the Act so far as the states are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor." *Id.* at 285-86, 93 S.Ct. at 1618-19. In other words, since Congress did not clearly state its intent to allow citizen suits against the states in federal court, and because the Secretary of Labor could fully effectuate the federal purposes behind the statute, federalism and federal supremacy did not require abrogation.

When we weigh the competing federal and state interests at stake in the area regulated by IGRA, however, there can be no doubt that the federal interests predominate, requiring abrogation of the states' immunity.

1. The Federal Government's Fundamental Interest in Preserving Peace Among the Sovereigns Existing Within Its Borders Requires the Abrogation of the States' Immunity in IGRA

A central function of our federal system is ensuring peace among the numerous sovereigns existing within the United States' borders. *See* U.S. Const., preamble ("We the People of the United states, in Order to . . . insure domestic tranquility"). *See also* The Federalist No. 6, at 59-60 (A. Hamilton) (Rossiter ed. 1961).[9] As Justice Scalia observed in *Union Gas*, there is an "inherent necessity of a tribunal for peaceful resolution of disputes between the Union and the individual states, and between the individual states themselves . . . " *Union Gas*, 491 U.S. at 33, 109 S.Ct. at 2298 (Scalia, J., concurring in part and dissenting in part). This federal function applies with equal force to disputes between Indian tribes and the states. *See* The Federalist No. 3 at 44 (J. Jay) ("Not a single Indian war has yet been produced by aggressions of the present federal government, feeble as it is; but there are several instances of Indian hostilities having been provoked by the improper

[9]Hamilton wrote that:

> So far is the general sense of mankind from corresponding with the tenets of those who endeavor to lull asleep our apprehensions of discord and hostility between the states, in the event of disunion, that it has from long observation of the progress of society become a sort of axiom in politics that vicinity, or nearness of situation, constitutes nations natural enemies. An intelligent writer expresses himself on this subject to this effect: "Neighboring nations [says he] are naturally enemies of each other, unless their common weakness forces them to league in a confederate republic, and their constitution prevents the differences that neighborhood occasions, extinguishing that secret jealousy which disposes all states to aggrandize themselves at the expense of their neighbors." This passage, at the same time, points out the evil and suggests the remedy.

The Federalist No. 6, at 59-60 (A. Hamilton).

conduct of individual states, who, either unable or unwilling to restrain or punish offenses, have given occasion to the slaughter of many innocent inhabitants"). Maintaining peace with Indian tribes has long been a goal of the Federal Government. *See* F. Cohen, Handbook of Federal Indian Law, at 39 (1941) ("Most of the very early treaties were treaties of peace and friendship").

This federal interest is particularly strong given the states' traditional hostility to Indian tribes. *See, e.g., United States v. Wright*, 53 F.2d 300 (4th Cir. 1931) (discussing North Carolina's pernicious anti-Indian discrimination).[10] Indeed, in enacting IGRA, Congress expressly "[r]ecogniz[ed] that the extension of state jurisdiction on Indian lands has traditionally been inimical to Indian interests . . . " Senate Report at 5. The states' hostility to Indian tribes has continued through the present day, and has appeared in the very area at issue in this case. For example, in *Sycuan v. Roache*, 788 F. Supp. 1498 (S.D. Ca 1992), *aff'd* at 38 F.3d 402 (9th Cir. 1994) (petition for rehearing under submission), state law enforcement officers, completely lacking in jurisdiction, conducted illegal raids on Indian lands to disrupt Tribal gaming operations. Amicus Curiae Table Mountain Rancheria suffered a similar illegal raid. *See Table Mountain Band of Indians of the Table Mountain Rancheria v. Magarian*, No. 91-600 (E.D. Cal. Nov. 9, 1991)

[10] As the Fourth Circuit noted:

> [T]he State of North Carolina has afforded [Indians] few of the privileges of citizenship. It has not furnished them schools, and forbids their attendance upon schools maintained for the white and colored people of the State. It will not receive their unfortunate insane or their deaf, dumb, or blind in State institutions. It makes no provision for their instruction in the arts of agriculture or for the care of their sick or destitute. It supervises their roads; but until comparatively recent years these were maintained by their own labor.

53 F.2d at 304-05.

(order granting temporary restraining order against Fresno County Sheriff and order to show cause re preliminary injunction).

Given the long and unfortunate history of animosity and mistrust between Tribes and states, neither group of sovereigns are likely to submit to the judicial jurisdiction of the other. Hence, if Tribal-State disputes regarding Indian gaming under IGRA are to be resolved peacefully, they must be resolved in the federal courts. Nowhere is the United States' peace-making role more significant. Thus this factor weighs heavily in favor of finding Congressional power to abrogate state immunity in IGRA.

2. The Federal Government's Interest in Promoting Indian Self-Sufficiency, and *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, Requires the Abrogation of the States' Immunity In IGRA

It is long-settled that the states are not immune from suit by the United States. *See United States v. Texas*, 143 U.S. 621, 12 S.Ct. 488 (1892). Nor are states immune from suits by the United States brought on behalf of Indian Tribes. *See United States v. Minnesota*, 270 U.S. 181, 195, 46 S.Ct. 298, 301 (1926).

In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634 (1976), this Court held that Indian Tribes' access to federal court to obtain equitable relief from state taxation was "as broad as that of the United States suing as the tribe's trustee." *Id.* at 473, 96 S.Ct. at 1641. *See also Blatchford*, 111 S.Ct. at 2583. Indian Tribes' ability to repel states' intrusions on tribal sovereignty by representing themselves furthers the federal policy of promoting tribal self-sufficiency — a goal which Congress expressly stated in IGRA. *See* 25 U.S.C. § 2701(4). As noted *supra*, IGRA authorizes Indian tribes to bring, and federal courts to

entertain, suits for equitable relief against the states for this very purpose. *See* 25 U.S.C. § 2710(d)(7). Thus *Moe's* holding appears to authorize the type of suit IGRA authorizes Tribes to bring against the states. This factor also weighs heavily in favor of Congress' abrogation power in IGRA.

3. The Federal Government's Trust Responsibility to Indian Tribes Requires That Any Abrogation of Immunity in IGRA Apply to the States as Well as to the Tribes

The Federal Government "has an overriding duty of fairness when dealing with Indians, one founded upon a relationship of trust for the benefit of" Indians. *Fox v. Morton*, 505 F.2d 254, 255 (9th Cir. 1974). *See Hagen v. Utah*, ____ U.S. ____, 114 S.Ct. 958, 971 n.1 (1994); *Arizona v. California*, 460 U.S. 605, 650, 103 S.Ct. 1382, 1407 (1983) (Brennan, J., concurring in part and dissenting in part); *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S.Ct. 1049, 1054 (1942). The Federal Government's actions toward Indian Tribes must meet the highest standards of fiduciary duty. *Nance v. Envt'l Protection Agency*, 645 F.2d 701, 710 (9th Cir. 1981).

The duty to protect Indian property rights inheres in the trust relationship between the Federal Government and Indians. *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980). In IGRA, Congress recognized that Indian tribes have property rights in Indian gaming: "Indian tribes have the *exclusive right* to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a state which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5).

Given the federal government's trust relationship with Indian tribes, for it to submit the Tribes to suit by the

States, without reciprocally submitting the States to suit by the Tribes, would constitute a breach of the trust relationship.

The Court's sensitivity to the importance of reciprocity in this area is evidenced in *Blatchford*, in which the Court was motivated, in part, by the fact that "[w]e have repeatedly held that Indian tribes enjoy immunity against suits by states, Potawatomi Indian Tribe, *supra*, 498 U.S., at ____, 111 S.Ct., at ____, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the states, we do not believe that it surrendered the states' immunity for the benefit of the tribes." *Id.* 501 U.S. at ____, 111 S.Ct. at 2583.

This factor also weighs heavily in favor of Congress' abrogation power in IGRA.

4. This Court's Precedents, and The Doctrine of Stare Decisis, Weigh in Favor of Congress' Abrogation Power in IGRA

For the Court to affirm the Eleventh Circuit in this case and hold that Congress lacks the power to abrogate the states' sovereign immunity when legislating under the Indian Commerce Clause, would require the Court to make a radical departure from its precedents. Specifically, it would require overruling *Union Gas* and *Parden*, 377 U.S. at 192, 84 S.Ct. at 1212 ("[b]y empowering congress to regulate commerce . . . the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation"). And it would require disapproving of numerous decisions that have recognized, or assumed, that Congress may abrogate the states immunity when legislating under its Article I powers. *Atascadero*, 473 U.S. at 242, 105 S.Ct. at 3147 (affirming that Congress may abrogate by

making its intention unmistakably clear); *Employees*, 411 U.S. at 285, 93 S.Ct. at 1618 (assuming Congress has power under the Commerce Clause to abrogate); *Quern*, 140 U.S. at 343, 19 S.Ct. at 1146; *Edelman*, 415 U.S. at 673, 94 S.Ct. at 1360; *Pennhurst*, 465 U.S. at 99, 104 S.Ct. at 907; *Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 305, 110 S.Ct. 1868, 1872-73 (1990); *Welch*, 483 U.S. at 475, 107 S.Ct. at 2947; *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 252, 105 S.Ct. 1245, 1261 (1985).

"The rule of law depends in large part on adherence to the doctrine of stare decisis. Indeed, the doctrine is 'a natural evolution from the very nature of our institutions.' " *Welch*, 483 U.S. at 479, 107 S.Ct. at 2948-49 (*quoting* Lile, *Some Views on the Rule of Stare Decisis*, 4 Va.L.Rev. 95, 97 (1916)). Thus "any departure from the doctrine of stare decisis demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 2311 (1984). There is no such "special" justification for reversing the cases cited *supra*. Thus, this factor also weighs in favor of Congress' abrogation power in IGRA.

5. The States' Minimal Interest in Regulating Activities on Indian Lands Are Adequately Protected by the National Political Process

The theory of protection for states articulated in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005 (1985), proved more than adequate in the case of IGRA. As noted above, prior to IGRA's enactment, the states had little or no regulatory jurisdiction over Indian gaming. *See Cabazon*, 480 U.S. at 208-211, 107 S.Ct. at 1087-89. Through the legislative process, the states effectively presented their concerns to Congress. *See* Senate Report at 1-2, 13, 33, 36. The result of this process, IGRA, provides the states with an unprecedented opportunity to expand their civil regulatory jurisdiction over gaming into

Indian country. *See* 25 U.S.C. § 2710(d)(3)(C)(I) (Tribal-State compacts governing class III gaming on Indian lands may include provisions applying state criminal and civil laws and regulations).

> There is no down side for the states in the process prescribed by IGRA: Under the IGRA, no penalties can be assessed against a state for failing to negotiate. What the state would lose by such a stance would be possible input into a Tribal-State gaming compact. If a state fails to negotiate, the Secretary of the Interior, after consultation with the Tribe, could then prescribe the procedures under which the Tribe could conduct Class III gaming on the Indian lands over which the Tribe has jurisdiction, and the state would lose its input into the process.

Cheyenne River Sioux Tribe v. South Dakota, 830 F. Supp. 523, (D. S.D. 1993), *aff'd* 3 F.3d 273 (8th Cir. 1993).

Thus, even this factor also weighs in favor of Congress' power to abrogate state immunity in IGRA.

IV.

CONCLUSION

For the reasons set forth herein, the amici Tribes respectfully request that the Court reverse the opinion and judgment of the Eleventh Circuit Court of Appeal that respondent State of Florida is entitled to a judgment of dismissal on the basis of sovereign immunity, and remand the case for further proceedings.

Respectfully submitted,

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SEMINOLE TRIBE OF FLORIDA,

Petitioner,

v.

STATE OF FLORIDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICI CURIAE* OF THE STOCKBRIDGE-MUNSEE INDIAN COMMUNITY, THE ONEIDA INDIAN NATION OF WISCONSIN, THE TONAWANDA BAND OF SENECAS, AND THE TUNICA-BILOXI TRIBE IN SUPPORT OF PETITIONER

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Interests of Amici Curiae

The Eleventh Circuit's decision in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994) is based on an incorrect interpretation of the relationship between the Indian Commerce Clause and the Eleventh Amendment. Amici support the Seminole Tribe in challenging the *Seminole* decision.[1]

The Stockbridge-Munsee Community is a federally-recognized Indian tribe. The Community was originally located in north central New York. Its land was acquired by the State in a number of transactions that were never approved by the federal government. The Tribe has filed a claim to those lands under the Indian Commerce Clause and Indian Nonintercourse Act, 25 U.S.C. §177. *Stockbridge-Munsee Community v. State of New York*, No. 86-CV-1140 (N.D.N.Y.). The defendants include the State, state officials, counties, and municipalities. The State and state officials have moved to dismiss the Community's claims based on the Eleventh Amendment.

The Oneida Indian Nation of Wisconsin is a federally recognized Indian tribe, with its principal situs at Green Bay Wisconsin. It is one of the three political successors in interest to the aboriginal Oneida Nation, located at the time of white contact in upstate New York. The Oneida Tribe of Wisconsin is also one of three plaintiffs in lawsuits pending in upstate New York known as the Oneida land claim cases. In these suits, the modern day successors to the Oneida

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[1] Pursuant to Rule 37.3, written consents from counsel of record for the parties have been filed with the Clerk of the Court.

Nation assert federal law based claims to the territory known as the Oneida Reservation. *Oneida Indian Nation of New York v. County of Oneida*, 70-CV-35 (N.D.N.Y.); *Oneida Indian Nation of New York v. County of Oneida*, 74-CV-187 (N.D.N.Y.). The first of these cases has been before this Court on two occasions. *Oneida Indian Nation v. County of Oneida*, 470 U.S. 226 (1985); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). Since the Court's 1985 decision, the State of New York has expressed its willingness to negotiate a settlement of the claims and has sporadically engaged in such negotiations. However, the State of New York has to date offered no land, money, or other resources toward a settlement of the Oneida land claim cases.

The Tonawanda Band of Seneca Indians is a federally recognized Indian nation in New York State. It is a party in a pending action concerning a Seneca claim under the Nonintercourse Act. *The Seneca Nation of Indians v. New York*, No. 93-CV-688A (W.D.N.Y.). A decision in the present case upholding State immunity under the Eleventh Amendment would adversely affect the rights and claims of the Senecas.

The Tunica-Biloxi Tribe is a federally recognized Indian Tribe which has a Reservation in Avoyelles Parish, Louisiana. The Tribe lodged a Litigation Request with the Interior Solicitor in August, 1980 regarding some 17,000 acres of land in the State of Louisiana which it claims under the Indian Nonintercourse Act. To date, the federal government has taken no action on this Litigation Request.

Further research and investigation have resulted in an increase to a total of 64,000 acres which can be claimed under the Nonintercourse Act. In addition, the Tribe is operating Class III gaming under the Indian Gaming Regulatory Act. The decision in *Seminole* poses serious questions as to (1) the Tribe's land claims, and (2) the enforceability of the Tribal-State compact for Class III gaming. Since the Indian Commerce Clause is the basis for both the Nonintercourse Act and the Indian Gaming Regulatory Act, this Court should affirm the principle that the Indian Commerce Clause abrogates the Eleventh Amendment immunity of the States.

The Stockbridge-Munsee Community, the Oneida Nation of Wisconsin, the Tonawanda Band of Seneca Indians, and the Tunica-Biloxi Tribe have a significant interest in advancing the proper interpretation of the Indian Commerce Clause and the Eleventh Amendment. If the *Seminole* decision stands, the Tribes' land claims could be subject to dismissal even though the clear purpose of the Indian Commerce Clause was to confer authority in Indian affairs on the federal government to the exclusion of the states.

Summary of Argument

The Indian Commerce Clause gives Congress the authority to abrogate the Eleventh Amendment immunity of states. Congress has validly done so in the Nonintercourse Act and other Indian statutes. Alternatively, the federal courts can enjoin violations of federal Indian statutes, such

as the Nonintercourse Act, enacted under Congress' Indian Commerce Clause authority.

Argument

I. Introduction

The Indian Commerce Clause, Art. 1, § 8, cl 3, states that "Congress shall have the power . . . to regulate commerce . . . with the Indian tribes". Congress has passed a number of Indian statutes, under the Indian Commerce Clause, regulating a broad range of activities in Indian Country. The earliest and most fundamental of such legislation is the Nonintercourse Act[2] which has been consistently construed by courts to regulate states as well as private individuals in their dealings with Indian lands. *County of Oneida*, 470 U.S. 226; *Oneida Indian Nation*, 414 U.S. 661; *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2d Cir. 1980) *cert. den.* 452 U.S. 968 (1981). The Nonintercourse Act provides,

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or

[2] The Nonintercourse Act was initially passed in 1790, ch. 33, 1 Stat. 137. Congress passed a stronger, more detailed version in 1793. Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; *see also* the Act of May 19, 1796, ch. 30, 1 Stat. 469; the Act of Mar. 3 1799, ch. 46, 1 Stat. 743; the Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; the Act of May 6, 1822, ch. 58, 3 Stat. 682; Act of June 30, 1834, ch. 161, 4 Stat. 729. The Nonintercourse Act is now codified at 25 U.S.C. §177 (1983).

> equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. . . .

Amici have Nonintercourse Act claims against the State of New York which raise, or could raise, Eleventh Amendment issues. The Eleventh Circuit incorrectly interpreted the relationship between the Indian Commerce Clause and the Eleventh Amendment in *Seminole*.

II. In the Indian Commerce Clause, the States Surrendered to Congress all Sovereign Power to Manage Relations With Indian Tribes, Including States' Sovereign Immunity to Suit in Cases Arising Under Federal Indian Legislation

In perhaps the clearest explication of the law of state sovereign immunity, Justice Stevens observed in *Pennsylvania v. Union Gas*, 491 U.S. 1, 23 (1989) (Stevens, J. concurring) as follows:

> It is important to emphasize the distinction between our two Eleventh Amendments. There is first the correct and literal interpretation of the plain language of the Eleventh Amendment that is fully explained in Justice Brennan's dissenting opinion in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247, 87 L.Ed.2d 171, 105 S.Ct. 3142 (1985). In addition, there is the defense of sovereign immunity that the Court has added to the text of the Amendment in cases

like *Hans v. Louisiana*, 134 U.S. 1, 33 L.Ed. 842, 10 S.Ct. 504 (1890).

The former is not implicated in this case, inasmuch as the issue before the Court arises under federal question jurisdiction, not diversity jurisdiction.[3] With respect to the latter, that is, the judicially created doctrine of state immunity from suits arising under federal legislation, state sovereign immunity is viewed by the Court as necessary to maintain the "constitutionally mandated balance of power between the States and Federal Government." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).[4]

Under the Indian Commerce Clause of the Constitution, states are effectively ousted from the field in favor of exclusive and plenary congressional authority. The Delegates to the Federal Convention understood the necessity

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[3] The Eleventh Amendment provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

[4] The *Atascadero* Court did not adopt Justice Stevens' two prong analysis of state sovereign immunity, i.e., as a jurisdictional bar in diversity cases only and otherwise as a limitation arising from prudential concerns of federalism. However, the *Atascadero* Court did view a broadly read Eleventh Amendment as necessary to preserve the sovereign balance struck between states and the Federal Government in the Constitution. *Id.* at 238 n.2. Even this broad reading of the Eleventh Amendment allows a finding that Congress can abrogate state sovereign immunity in the exercise of its Indian Commerce Clause authority inasmuch as the Founders contemplated no role for state sovereignty in the field of Indian affairs. *See* discussion below.

for undivided authority in Indian affairs in the central government because of the unquestionable failure of divided authority over the subject between the states and federal government under the Articles of Confederation. As a result, the states reserved no sovereign authority over Indian affairs under the Constitution and no corresponding sovereign immunity from suit, in the face of a congressional abrogation thereof.[5]

A. The Delegates to the Federal Convention Intended and Accomplished a Delegation to Congress of the Whole and Complete Authority to Manage Relations with Indian Tribes

When the Delegates came together at the Federal Convention, consensus existed among them on fundamental and debilitating defects of the Articles of Confederation. Among these was the inability of the general government to adopt and implement an effective Indian policy. The Delegates set about devising a form of federal government

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[5] In *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the Court rejected the proposition that states had been stripped of their sovereign immunity to suit by Indian tribes "in the plan of the convention." *Id.* at 782. Amici do not revisit that proposition here. Amici do not argue for a self-executing and complete abrogation of state sovereign immunity under the Indian Commerce Clause, similar to that proposed in *Blatchford*. Rather, Amici argue that Congress holds the authority under the Indian Commerce Clause to abrogate state authority in federal legislation where necessary to maintain the constitutionally mandated pre-eminence of congressional and tribal authority in Indian country.

with these specific concerns in mind, so as to render the new federal government "adequate to the exigencies and government, and the preservation of the Union." *See* M. Farrand, The Framing of the United States Constitution, ch. III (1913).

The difficulties with federal Indian policy existed in large part because of the ambiguous language of the Indian clause of the Articles of Confederation. In Article IX, Congress' enumerated powers included that of "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." IX Journals of the Continental Congress 919, November 15, 1777. There is no doubt that the main body of the Articles' Indian clause delegated power to Congress over the subject, but considerable doubt existed regarding the extent of state authority preserved by the "shackles" in the limiting provisos. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 554 (1832).

In Madison's view, the "obscure and contradictory" language of the limiting provisos rendered the effective management of Indian affairs an impossibility: no management of trade could be undertaken by the federal government that did not infringe upon the legislative right of states. The Federalist, No.42; P. Prucha, American Indian Policy in the Formative Years 28-30 (1970). The Continental Congress' experience in administering Indian affairs bore out Madison's criticism of the divided authority over the subject in the Articles' Indian clause.

Immediately after the conclusion of the Revolutionary War, the Congress took steps to establish peace with Indian nations who had fought on both sides of the conflict. In accordance with instructions from Congress, federal treaty commissioners in the northern district made arrangements to treat with the Six Nations for peace. *See* XXV Journals of the Continental Congress 687. New York State objected to federal efforts to treat with Indian nations in its borders and attempted to conclude peace with the Six Nations itself. Hough Report on Proceedings of the Commission 9-10 (1861). New York State's effort failed, however, and the federal treaty commissioners felt obliged to advise the Six Nations that "a treaty with an individual State, without the sanction of Congress, could be of no validity." N. Craig, II Olden Times, 6 (Pittsburgh 1848).

Acting under very similar instructions from Congress in 1786, federal treaty commissioners in the southern district concluded a number of treaties with the Cherokee, Choctaw and Chickasaw Nations, all of whom were located within the borders of North Carolina and Georgia. *See* Treaties of Hopewell, November 28, 1785, January 3, 1786, and January 10, 1986, 7 Stat. 18, 21, and 24. Both states openly challenged Congress' authority to demarcate tribal lands and prohibit intrusions thereon as the Treaties of Hopewell had done. Both states encouraged their citizens to settle upon Indian lands and, in some cases, purported to purchase tribal land from individual Indians. *See generally*, Prucha at 32-40. By the time of the Federal Convention, the intrusions were so aggressive "as to amount to an actual although informal war of the said white inhabitants against the said Cherokees." Report of Secretary

of War Henry Knox to the Continental Congress, XXXIV Journals of the Continental Congress 342, July 1788.

The Continental Congress assured the signatory Indian tribes of the inviolability of the federal treaties, investigated the st te intrusions onto tribal lands, and continuously asserted its authority to manage relations with Indian tribes under Article IX. In the end, though, the Continental Congress acknowledged the limitations it faced in effectively administering Indian affairs arising from the authority reserved by the states in the Indian clause:

> [B]ut there is another circumstance far more embarrassing, and that is the clause in the confederation relative to managing all affairs with the Indians, &c. is differently construed by Congress and the two States within whose limits the said tribes and disputed lands are. The construction contended for by those States, if right, appears to the committee, to leave the federal powers, in this case, a mere nullity; and to make it totally uncertain on what principle Congress is to interfere between them and the said tribes; the States not only contend for this construction, but have actually pursued measures in conformity to it.

XXXIII Journals of the Continental Congress 457, August 3, 1787. The lesson of this experience was not lost on the Delegates to the Federal Convention.

The few references to Indian affairs made by Delegates at the Convention were variations on the same theme: that states' claim to authority and interference in the conduct of Indian affairs was a defect in the Articles that must be avoided in the new constitution. For example, during debate on the New Jersey Plan, which would have established a far weaker federal government than the Virginia Plan previously debated, Madison queried:

> Will it prevent encroachments on federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves, as well as in every other confederated republic ancient and modern. By the federal articles, transactions with the Indians appertain to Congs. Yet in severl instances, the States have entered into treaties and wars with them.

Farrand, I Records of the Federal Convention of 1787 315; *see also* Farrand, III Records of the Federal Convention of 1787 548 (Madison's comment) ("In certain cases, the authy of the Confederacy was disregarded, as in violations not only of the Treaty of peace; but of Treaties with France & Holland, which were complained of to Cong. In other cases, the Fedl authy was violated by Treaties & wars with Indians, as by Geo."); *and* II Papers of James Madison 246-47 (letter of Edmund Randolph observing that a state treaty with Indians would be "in defiance of the confederation.")

When the Convention considered enumerated powers for Congress, Charles Pinckney proposed that Congress be

given the power "to regulate affairs with the Indians, as well within as without the limits of the U.S." I Elliott's Debates on the Federl Convention 223 (1836). This and other enumerated powers were referred to the Committee of Eleven, which simplified the language to read "and with Indian tribes" following the general commerce clause. IV Elliott's Debates 283. The recommendation was adopted by the Convention without any substantive debate, thus stripping Congress' authority over Indian affairs of its shackles.

With respect to management of relations with Indian tribes, it was plainly the intent of the Delegates to delegate the power wholly and entirely to the Congress. Experience had taught the Delegates that division of authority over the subject between the states and federal government was unworkable. Consequently, the language that had reserved states' power over the subject was stripped from the new Indian Commerce Clause, delivering over to the Congress a power in which the states could not participate. *Worcester v. Georgia*, 31 U.S. at 559.[6]

B. This Court has Consistently Construed the Indian Commerce Clause as Ousting State Authority Over the Subject

Since *Worcester v. Georgia*, above, the Court has acknowledged the unique position of Indian tribes and

[6] In this respect, the scope of the Indian Commerce Clause exceeds that of the general Commerce Clause. *See* Prentice and Egan, The Commerce Clause of the Federal Constitution 342 (1898); *see also* 1 Op.A.G. 645 (1824).

Congress' authority over Indian affairs under the Constitution. There, the Court rejected Georgia's claim to authority over affairs of the Cherokee Nation, observing that, "The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States." *Id.* at 562. This result was based, in part, upon the basic principle of constitutional law that the Constitution delegated to Congress broad legislative authority over Indian affairs, one that excluded states. Cohen's Handbook of Federal Indian Law 260 (1982 ed.). The Court has since consistently interpreted the Indian Commerce Clause as delegating to the federal government an authority to manage relations with Indians in Indian country that excludes the states altogether. *See United States v. John*, 437 U.S. 634 (1978); *United States v. Mazurie*, 419 U.S. 544 (1975); *United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Kagama*, 118 U.S. 375 (1886).

Indeed, in modern times, the Court has effectively presumed that state laws and regulations have no application to Indian tribes in Indian country, absent the express consent of Congress. Cohen's Handbook at 259-264. This presumption derives in part from the Indian Commerce Clause itself. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). It also derives from tribes' unique sovereign status, a status assumed by and enshrined into constitutional law by the Indian Commerce Clause.

> We long ago departed from the 'conceptual clarity of Mr. Chief Justice Marshall's view

> in *Worcester*' (citation omitted) and have acknowledged certain limitations on tribal sovereignty. Nevertheless, in demarcating the respective spheres of state and tribal authority over Indian reservations, we have continued to stress that Indian tribes are unique aggregations possessing 'attributes of sovereignty over both their members and their territory.' (Citation omitted.) Because of their sovereign status, tribes and their reservation lands are insulated in some respects by a 'historic immunity from state and local control' (citation omitted) . . . our cases establish that 'absent governing Acts of Congress,' a State may not act in a manner that 'infringed on the right of reservation Indians to make their own laws and be governed by them.' (Citations omitted.)

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-332 (1983).

In the important area of taxation, the Court applies a *per se* constitutional rule that, absent the express consent of Congress, states have no authority to tax Indian tribes in Indian country. *California v. Cabazon Band of Indians*, 480 U.S. 202 n.17 (1987); *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985). Outside the area of taxation, state regulation of Indian tribes in Indian Country has been upheld only in "exceptional circumstances" where the burden is a minimal one imposed for the purpose of enforcing state law as against non-Indians. *See e.g.*, *Confederated Tribes of the Colville*

Indian Reservation v. Washington, 447 U.S. 134 (1980) and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), upholding state record-keeping requirements imposed on tribes to enforce payment by non-Indians of certain state taxes.

Even where a state tax or regulation applies to a non-Indian doing business with an Indian tribe in Indian country, the Court has engaged in a particularized inquiry into the nature of the state, federal and tribal interests at stake to determine whether the state law has been preempted by federal law. *Department of Taxation and Finance of New York v. Attea*, 512 U.S. __, 114 S.Ct. 2028 (1994). The preemption analysis undertaken by the Court in such cases does not depend upon an express statement to that effect in federal statutes, in contrast to the preemption rule applied in other fields. Hirsch, Toward A New View of Federal Preemption, 1972 U.Ill. L.Rev. 515. Instead, state authority can fail from implied as well as express federal preemption of state activity. *Ramah Navajo School Bd. v. Bureau of Revenue*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

In the end, these special rules that apply only in the field of federal Indian law are premised upon Congress' and tribes' exclusive authority to govern affairs of Indian tribes in Indian country under the Indian Commerce Clause. Simply put, states have no sovereign powers respecting affairs with Indian tribes absent an act of Congress. As a consequence, Congress can abrogate states' immunity to suit in federal Indian legislation when, in the judgment of Congress, such is appropriate to preserve the constitutionally

mandated pre-eminence of federal and tribal authority in Indian Country.

C. In the Sphere of Indian Affairs, State Action Including Immunity to Suit Must be Governed by Applicable Federal Indian Legislation

In *Pennsylvania v. Union Gas Company*, 491 U.S. 1, the Court ruled that Congress could and did, in a particular exercise of its power over interstate commerce, abrogate the states' immunity from suit. Two lines of reasoning were given in support of this conclusion. Both lines support an interpretation of the Indian Commerce Clause as authorizing Congress to abrogate states' immunity from suit as well.

The plurality opinion in *Union Gas* relied upon the so-called waiver cases in its analysis of the immunity issue. *Citing Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964), the Court characterized the Commerce Clause as a surrender of state sovereignty that carried with it a surrender of state sovereign immunity. *Union Gas*, above at 14. This view of the Commerce Clause was confirmed, according to the plurality, in *Employees v. Missouri Dep't of Pub. Health*, 411 U.S. 279 (1973). Although those cases found evidence to support a waiver of state immunity arising from the state's voluntary participation in a federally regulated activity, those cases' interpretation of the Commerce Clause led the plurality to conclude that Congress could simply abrogate state immunity. *Union Gas*, above at 20-22.

As established above, the reach of the Indian Commerce Clause is as great if not greater than the general Commerce Clause. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), where the Court observed: "Interstate Commerce and Indian Commerce clauses have very different application. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation (citations omitted), the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." The rationale supporting the plurality's conclusion in *Union Gas* is therefore even more compelling in the case of federal Indian legislation than in the case of legislation regulating interstate commerce.

In concurring in *Union Gas*, Justice Stevens analyzed the issue as "the proper role of the federal courts in the amalgam of federal-state relations." *Id.* at 25. Thus, the availability of state immunity depends upon the application of prudential rather than jurisdictional concerns. *Id* at 26. When in the exercise of its plain constitutional authority, Congress concludes that the preservation of federal rights or interests requires the abrogation of states' immunity to suit, Justice Stevens concluded that the principles of federalism and comity allow Congress to do so. *Id.* at 27-29.

In Amici's view, Justice Steven's analysis of the state immunity issue is the correct one for this case. As Justice Stevens demonstrates, it explains and is consistent with this Court's body of state sovereign immunity cases. *Id.* More importantly for present purposes, it reflects this Court's

traditional analysis of Indian law issues on principles of federalism that are unique to the field.

This Court has long held that Indian tribes, as "domestic dependent nations," are immune from suit absent a clear waiver by the tribe or congressional abrogation of tribal immunity. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991); *Oklahoma Tax Commission v. Citizen Band Potawatomi*, 498 U.S. 505 (1991). Plainly, Congress can abrogate Indian tribes' immunity from suit and has done so in limited circumstances. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

To maintain the constitutionally mandated exclusion of state authority from Indian country, then, it follows that Congress must have comparable authority to abrogate states' immunity from suit under the Indian Commerce Clause. In *Blatchford*, the Court saw no blanket waiver of tribal sovereign immunity in the plan of the convention, there being no "mutuality" of concessions in the plan of the convention. *Id.* at 782. If the Indian Commerce Clause authorizes Congress to abrogate tribes' immunity to suit, then "mutuality" of concessions requires that the Indian Commerce Clause be construed to authorize Congress to abrogate states' immunity from suit.

Congress cannot be vested with full power to preserve exclusive federal and tribal authority in Indian country unless it has the authority to abrogate state immunity to suit, where appropriate. Congress' previous inability to regulate or prohibit states activity in Indian country led to the adoption of the Indian Commerce Clause, with its plain

language preserving the field for Congress alone. If Congress can and generally does exclude states from the field altogether, surely Congress can in its regulation of states in the field abrogate state sovereign immunity.

III. Federal Courts Can Compel State Officials to Comply With the Indian Commerce Clause

The Indian Commerce Clause provides a separate basis for relief in Indian land claims, and other, cases. State officials are not immune from suit when they violate the Constitution. In particular, if they withhold property obtained in violation of the Indian Commerce Clause, the federal courts can act to stop the violation.

One of the weaknesses in the Articles of Confederation was that they did not clearly delineate the division of authority between the states and the Confederal government in Indian affairs. "Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. 1, §8, cl 3, that granted Congress the power to regulate trade with the Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. at 234 n.4. Of specific concern was the states' practice of treating with Tribes for land cessions. Clinton and Hotopp, Judicial Enforcement of the Federal Restraint on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me.L.Rev. 17, 36-37 (1979). The Indian Commerce Clause and the Nonintercourse Act changed that making Indian affairs the "exclusive province"

of the federal government and the "extinguishment of Indian title [dependent upon] the consent of the United States." *County of Oneida*, 470 U.S. at 234, 240.

The courts consistently acted to enforce those restrictions on alienation. *Id.* at 234-36; *see also Oneida Indian Nation v. County of Oneida*, 414 U.S. at 669-75. Although states were, in large part, the object of the Indian Commerce Clause and the Nonintercourse Act, it is only in recent times that Tribes have sued states and state officials for violations of those laws. *See e.g.*, *Stockbridge-Munsee Community v. State of New York*, No. 86-CV-1140, *above*; *Mohegan Tribe v. Connecticut*, Civ. No. H-77-434 MJB (D.Conn.); *Golden Hill Paugussett Tribe v. Weicker*, No. 2:92CV00738 (PCD) (D.Conn.).

Such suits are not barred by the Eleventh Amendment. Sovereign immunity does not protect state officers when they violate the Constitution and federal statutes. *Ex Parte Young*, 209 U.S. 123 (1908). Land acquisitions made in violation of the Indian Commerce Clause and the Nonintercourse Act were "void *ab initio*". *County of Oneida*, 470 U.S. at 245. The acts of state officials in holding land so acquired is an ongoing violation of the Indian Commerce Clause and the Nonintercourse Act. It is just such acts that federal courts can enjoin pursuant to the *Ex Parte Young* doctrine.

The doctrine of *Ex Parte Young* developed in order to give "life to the Supremacy Clause." *Green v. Mansour*, 474 U.S. 64, 68 (1985). The "theory" is that "an unconstitutional statute is void . . . and therefore does not

'impart to [the official] any immunity from responsibility to the supreme authority of the United States'". *Id.* (Citations omitted). The *Ex Parte Young* doctrine was foreshadowed by decisions involving real property. In *Tindal v. Wesley*, 167 U.S. 204, 221 (1896), this Court held that the "settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf." *Tindal* relied on the earlier decision in *United States v. Lee*, 106 U.S. 196 (1882).

The "rule of law" set out in *Tindal* and *Lee* was clarified in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) and *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 688 (1982). Those cases made clear that the "Eleventh Amendment does not bar an action against a state official that is based on a theory that the officer acted beyond the scope of his statutory authority or, if within that authority, that such authority is unconstitutional." *Id.*, at 689.

The Indian land claim cases fit within the *Ex Parte Young* doctrine as prefigured by *Tindal* and *Lee* and interpreted in *Treasure Salvors*. Where state officers hold land acquired from tribes without federal consent, they are acting in violation of the Indian Commerce Clause and the Nonintercourse Act. The Eleventh Amendment does not protect them in that instance. *Treasure Salvors*, 458 U.S. at 689. Such an ongoing breach of federal law is "precisely the type of continuing violation for which a remedy may

permissibly be fashioned under Young." *Papasan v. Allain*, 478 U.S. 265, 282 (1986). Permitting relief against state officers in these circumstances protects the federal interests embodied in the Indian Commerce Clause and the Nonintercourse Act.

Conclusion

The Indian Commerce Clause gives Congress exclusive authority in Indian Affairs. Concomitantly, Congress and the federal courts have the authority to enforce that authority against the states.

Respectfully submitted,

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SEMINOLE TRIBE OF FLORIDA,
Petitioner,

VS.

STATE OF FLORIDA, et al.,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL INDIAN GAMING ASSOCIATION, MINNESOTA INDIAN GAMING ASSOCIATION AND CALIFORNIA-NEVADA INDIAN GAMING ASSOCIATION IN SUPPORT OF PETITIONER; APPENDIX IN SUPPORT

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No. 94-12

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,

VS.

STATE OF FLORIDA, et al.,
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit

BRIEF OF *AMICI CURIAE* NATIONAL INDIAN GAMING ASSOCIATION, MINNESOTA INDIAN GAMING ASSOCIATION AND CALIFORNIA-NEVADA INDIAN GAMING ASSOCIATION IN SUPPORT OF PETITIONER

I. Interest of Amici Curiae

This brief of amici curiae National Indian Gaming Association, Minnesota Indian Gaming Association and California-Nevada Indian Gaming Association (hereinafter the "Associations"), is filed in support of petitioner Seminole Tribe of Florida pursuant to the written consent of all parties. The Associations are national and regional organizations representing the interests of federally recognized tribal governments that depend on gaming under the Indian Gaming Regulatory Act, 25 U.S.C. sections 2701-2721

("IGRA" or the "Act") to fund education, care for the elderly, housing, health care and other tribal governmental programs. Congress anticipated that in order to achieve the Act's goals of tribal self-sufficiency and funding for important governmental projects, tribal gaming activities would be pursued in, and have an impact on, interstate commerce. Congress recognized the effects Indian gaming would have on interstate commerce and enacted IGRA, in part, to address those effects. Amici will also demonstrate that, just as Congress expected, Indian gaming in practice has had a significant impact on interstate commerce.

The success of tribal governmental gaming depends in large part on the tribes' ability to engage in what the Act classifies as "class III" gaming, which is clearly the most economically competitive form of gaming available.[1] Congress provided, however, that in order to engage in class III gaming a tribe must either reach a Tribal-State compact or determine through court action that the state has chosen not to avail itself of the opportunity to regulate class III gaming. Amici share a concern that Congress' carefully-crafted balance of tribal and state interests, which conditions class III gaming on either achieving Tribal-State compacts — with

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[1] IGRA divides gaming into three classes. Class I gaming consists of social or traditional games, and is solely regulated by Tribes. *See* 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming consists of bingo and similar games, as well as nonbanking card games, and is regulated by Tribes and the National Indian Gaming Commission. *Id.* at §§ 2703(7), 2710(a)(2). Class III gaming consists of all other forms of gaming, *id.* at § 2703(8), including those forms of gaming in which states and private interests are most often involved, including horse racing, lotteries, and games associated with casinos. Because of the competition from those sources, and their importance in the marketplace, tribes which are deprived of class III opportunities are likely not to derive the revenues which generate the jobs and economic development demonstrated below, at Section III(E) of this brief, which exemplify the kinds of results which can be achieved where the class III process has worked.

court-supervised mediation to overcome negotiating impasses — or removing uninterested states from the process, not be frustrated by the Eleventh Amendment barrier erroneously erected by the Eleventh Circuit's opinion in this case, reported at 11 F.3d. 1016 (11th Cir. 1994). The lower court held that Congress lacks authority to abrogate the states' sovereign immunity to provide the judicial supervision necessary to carry out the class III process Congress so carefully designed.

In erroneously determining that Florida could invoke its sovereign immunity to upset the delicate balance wrought by Congress in IGRA, the Eleventh Circuit incorrectly held that IGRA was enacted exclusively under the Indian Commerce Clause, and that Congress lacked the power under that clause to abrogate state immunity. While the Indian Commerce Clause doubtlessly supports IGRA, and amici agree with petitioner Seminole Tribe that the Indian Commerce Clause alone empowers Congress to abrogate state sovereign immunity where necessary to carry out its constitutional duties regarding Indian affairs, the Act makes clear that Congress was also acting pursuant to its powers over interstate commerce. An analysis of that power provides further support to petitioner's position, as well as supplying an independent basis for upholding the Act's class III compacting process.

II. Summary of Argument

Congress enacted IGRA, in part, pursuant to its powers under the Interstate Commerce Clause, and Tribes are in fact engaged in such commerce. Congress was explicitly concerned in IGRA with the tribes', states' and commercial gaming industries' interstate economic interests and impact. The Act anticipates that tribes will use the mails, telephones, broadcasting and other technologies in furthering the Act's goals of promoting tribal self-sufficiency. Indeed,

congressional hearings and other forums that have examined the impact of tribal governmental gaming under IGRA are replete with examples of the Act's effect on interstate commerce. Those effects include: major purchases and sales of food and other goods which typically move in interstate commerce; dependency on transportation programs which utilize common carriers and highways; extensive employment for persons who commute from far beyond reservation boundaries with corresponding reductions in reliance on state and federal welfare programs; and dramatic upswings in tourism and visitors crossing state lines to enjoy tribal facilities. IGRA also addresses the need and means for combating organized crime,[2] which subject this Court has repeatedly held implicates interstate commerce. IGRA's references to the gaming industry generally and the reputation and integrity of those who participate in it, its focus on controlling organized crime, as well as the substantial impact on commerce which Indian gaming actually has, more than amply evidence congressional intent to legislate over matters affecting interstate commerce.

For all of these reasons, the Associations submit that Congress enacted IGRA, in part, under the Interstate Commerce Clause. Amici suggest that the Eleventh Circuit's contrary holding was erroneous, and respectfully request that the Court reverse the Eleventh Circuit's opinion and judgment.

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[2] Albeit little if any evidence of such crime in Indian Country has ever existed, largely due to tribes' own vigorous implementation of regulatory and control standards. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221, 107 S.Ct. 1083, 1094 (1987); S. Rep. No. 446, 100th Cong., 2d Sess. 1, 33 (1988) (Additional Views of Mr. McCain), *reprinted in* 1988 U.S. Code Cong. & Admin. News 3071, 3103 (hereinafter "Senate Report").

III. Argument

A. Congress Enacted the Indian Gaming Regulatory Act, in Part, Pursuant to its Powers Under the Interstate Commerce Clause

The Eleventh Circuit erroneously concluded that Congress did not enact IGRA pursuant to its plenary powers over interstate commerce. Specifically, the court found that "alleviating a supposed burden on interstate commerce" was not among Congress' purposes in enacting IGRA. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1025-26 (11th Cir. 1994). In reaching this conclusion, the lower court misapprehended the broad scope of congressional power under the Interstate Commerce Clause. Congress' power over interstate commerce is not limited to alleviating pre-existing burdens thereon, as the Eleventh Circuit assumed.

The Interstate Commerce Clause gives Congress the power to legislate with respect to all "commerce which concerns more states than one." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824). The power generally allows Congress to reach at least three categories of problems:

> First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods (18 U.S.C. secs. 2312-2315) or of persons who have been kidnaped (18 U.S.C. sec. 1201). Second, protection of the instrumentalities of interstate commerce, as for example, the destruction of an aircraft (18 U.S.C. sec. 32), or persons or things in commerce, as, for example, thefts from interstate shipments (18 U.S.C. sec. 659). Third, those activities affecting commerce.

Perez v. United States, 403 U.S. 146, 150, 91 S.Ct. 1357, 1359 (1971).

When Congress regulates under the Interstate Commerce Clause, it only needs a rational basis for finding that the regulated activity substantially affects interstate commerce, and the means it employs need only be reasonably adapted to the ends sought. *Hodel v. Virginia Surface Min. & Recl. Ass'n*, 452 U.S. 264, 101 S.Ct. 235 (1981). The "substantial economic effect" test is easily satisfied, even where the regulated activity is seemingly only local in nature. *See Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82 (1942) (regulation of wheat grown by a farmer wholly for home consumption was within Congress' interstate commerce power because it supplied the grower's needs which otherwise would have been satisfied by purchases in the open market). *See also United States v. Ohio*, 385 U.S. 9, 87 S.Ct. 66 (1966); (*per curiam*) *United States v. Haley*, 358 U.S. 644, 79 S.Ct. 537 (1959); (*per curiam*) *Bender v. Wickard*, 319 U.S. 731, 63 S.Ct. 1326 (1943) (*per curiam*); *Beckman v. Mall*, 317 U.S. 597, 63 S.Ct. 199 (1942) *(per curiam)*.

Congress need not even have interstate commerce as its primary motive when legislating under that power as is evident from the cases upholding the Civil Rights Act of 1964.[3] In *Heart of Atlanta Motel v. United States*, 379 U.S.

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[3]Nor must Congress recite by name the particular power under which it legislates. "The constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Miller*, 333 U.S. 138, 144, 68 S.Ct. 421, 424 (1948). *See also Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226, 243 n.18, 103 S.Ct. 1054, 1064 n.18 (1983); *Fullilove v. Klutznick*, 448 U.S. 448, 476-78, 100 S.Ct. 2758, 2773-2774 (1980). In *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451 (1941), "a class of activities was held properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce." *Perez*, 402 U.S. at 152, 91 S.Ct. at 1360. In *Darby*, the Court recognized that "Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. . . ." *Darby*, 312 U.S. at 120, 61 S.Ct. at 460. The fact that a statute does not contain congressional findings about the regulated activity's impact on interstate commerce is not determinative of the statute's constitutionality under the Interstate Commerce Clause. *Cf. See Katzenbach v. McClung*, 379 U.S. 294, 304, 85 S.Ct. 377, 384 (1964). Nor does "Congress need [to] make particularized findings in order to legislate." *Perez*, 402 U.S. at 156, 91 S.Ct. at 1362.

In this regard amici "note[s] the heavy presumption of constitutionality to which a 'carefully considered decision of a coequal and representative branch of our Government' is entitled." *U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 722, 110 S.Ct. 1428, 1432 (1990) (*quoting Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 319, 105 S.Ct. 3180, 3188 (1985)). *See also Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, ____ U.S. ____, 113 S.Ct. 2264, 2287 (1993); *Bowen v. Kendrick*, 487 U.S. 589, 817, 108 S.Ct. 2562, 2579 (1988).

241, 85 S.Ct. 348 (1964), the Court held that the Interstate Commerce Clause empowered Congress to regulate a motel located in downtown Atlanta that did not rent rooms to blacks. The requisite nexus to commerce existed because the motel was located near two interstate highways, derived 75 percent of its occupancy from out-of-state guests, and solicited business outside the state. The Court explained that Congress' power "to promote interstate commerce also includes the power to regulate the local incidents thereof." *Id.* at 258, 85 S.Ct. at 358. *See also Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377 (1964) (despite restaurant's distance from interstate transportation facilities, and despite lack of evidence that much of its business came from out-of-state travelers, a sufficient connection to interstate commerce existed because — looking to the total incidence of the regulated activities on commerce — the restaurant bought 46 percent of its food from a supplier who in turn had purchased it from out of state).

The Interstate Commerce Clause also gives Congress power to use prohibitions on the interstate transportation of

items or people in furtherance of "police power" or "general welfare" regulations. *See, e.g., United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451 (1941) (upholding Fair Labor Standards Act's wage and hour regulations for employees engaged in production of goods for interstate commerce, the statute's prohibitions against interstate shipment of goods produced in violation of those regulations, and its criminal penalties for employing workers engaged in commerce in violation of those regulations). In *Perez*, this Court upheld the Consumer Credit Protection Act, 18 U.S.C. 891, *et seq.*, which prohibited loansharking, even in entirely local activities, noting that Congress had recognized that loan sharks "are in large part under the control of 'organized crime,' " *Perez*, 402 U.S. at 147, 91 S.Ct. at 1358, and that organized crime, virtually by definition, operates on a national scale. *See id.* at 147 n. 1, 150, 91 S.Ct. at 1358 n.1, 1359.

In short, the Interstate Commerce Clause "has grown to vast proportions in its applications," *Employees of the Dep't of Pub. Health and Welfare v. Missouri Dep't of Pub. Health and Welfare*, 411 U.S. 279, 285, 93 S.Ct. 1614, 1618 (1973), such that "[i]t would be difficult to overstate the breadth or depth of the commerce power." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 20, 109 S.Ct. 2273, 2284 (1989) (Brennan, J., plurality).

Numerous aspects of IGRA reveal a sufficient nexus to commerce to bring the Act within Congress' interstate commerce powers. First, Congress expressly contemplated interstate gaming activity in IGRA. Second, in enacting IGRA, Congress balanced the competing economic interests of Indian Tribes, the states, and the commercial gaming industry. Third, IGRA regulates both Indian and non-Indian economic concerns. Fourth, Indian gaming has a substantial effect on interstate commerce, a fact that was well-known to Congress when it enacted IGRA. Finally, Congress enacted IGRA, in part, to assure that the nation-

wide problem of organized crime does not infiltrate Indian gaming.

B. Congress Expressly Contemplated Interstate Gaming Activity in IGRA

IGRA's Senate Report expressly contemplates interstate gaming activity:

> In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II[4] operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations *whether in the same or different states, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take.* Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games

[4]While this comment was in the context of class II gaming, the same possibilities exist regarding class III gaming. Interstate simulcast wagering on horse races is but one example of interstate gaming within IGRA's class III category. *See, e.g.*, Interstate Horse Racing Act, 15 U.S.C. § 3001 *et seq.* Moreover, IGRA's provisions regarding the permissible scope of both class II and class III gaming contain precisely the same requirement — namely, that the gaming activity be "located within a state that permits such gaming for any purpose by any person, organization or entity." 25 U.S.C. § 2710(b)(1)(A)) (class II). *Compare* 25 U.S.C. § 2710(d)(1)(B) (identical language regarding class III). As this Court has long held, identical words used in different parts of the same act are intended to have the same meaning. *See Department of Revenue of Oregon v. ACF Industries, Inc.*, ___ U.S. ___, 114 S.Ct. 843, 849 (1994); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860, 106 S.Ct. 1600, 1606 (1986); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 87, 55 S.Ct. 50, 51 (1934); *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 609 (1932).

> and *as long as such games are otherwise operated in accordance with applicable Federal communications law.*

Senate Report at 9 (emphasis added).

The Senate Report's reference to Federal communications law also suggests Congress' concern with interstate commerce, for Congress' power to regulate the communications industry flows from its interstate commerce power. *See, e.g., Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 370-71, 106 S.Ct. 1890, 1899-1900 (1986) (purpose of Communications Act of 1934, 47 U.S.C. §§ 151, 152(b), is to regulate interstate commerce in communication). *See also Federal Election Commission v. N.R.A. Political Victory Fund*, ___ U.S. ___, 115 S.Ct. 537, 542 (1994) (*citing Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce*, 93rd Cong., 1st Sess., 70-71 (1973)); 42 U.S.C. § 2000e(g) (defining "commerce" as including "communication among the several states"). Additionally, the Act explicitly exempts tribal marketing efforts from the criminal sanctions ordinarily imposed in connection with the transmission of gambling information by telephone and through the mails. *See* 25 U.S.C. § 2720.

In sum, the regulation of interstate gaming activities such as those Congress contemplated when enacting IGRA are plainly within Congress' interstate commerce power.

C. Congress' Concern in IGRA with the States' and the Commercial Gaming Industry's Economic Interests, as well as Tribes' Interests, Implicates Interstate Commerce

In enacting IGRA, Congress was concerned with balancing the interests of the states and the commercial gaming industry with those of Indian tribes:

> S. 555 [IGRA] is the outgrowth of several years of discussions and negotiations between gaming tribes, *states, the gaming industry*, the administration, and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands. In developing the legislation, the issue has been how best to preserve the right of tribes to self-government while, at the same time, to protect both the tribes and the gaming public from unscrupulous persons. An additional objective inherent in any government regulatory scheme is to achieve *a fair balancing of competitive economic interests.*

Senate Report at 1-2 (emphasis added). The Senate Report also noted that "[a]s the debate unfolded, it became clear that the interests of the states and of the gaming industry [included] . . . protection of their own games from a new source of economic competition." Senate Report at 33 (Additional Views of Mr. McCain).[5]

Congress' concern with balancing competing economic interests is apparent on IGRA's face, for the Act provides that "[i]n determining . . . whether a state has negotiated [with a Tribe] in good faith [for a class III compact], the court — (I) may take into account . . . *adverse economic*

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[5] *See also* Senate Report at 36 (Additional Views of Mr. Evans) ("Ironically, the strongest opponents of tribal authority over gaming on Indian lands are from states whose liberal gaming policies would allow them to compete on an equal basis with the tribes").

impacts on existing gaming activities . . ." 25 U.S.C. § 2710(d)(7)(B)(iii) (emphasis added). IGRA's Senate Report makes the same point:

> The bill allows states to consider negative *impacts on existing gaming activities.* That is not to say that the bill would allow states to reject Indian gaming on the mere showing that Indian gaming will compete with non-Indian games. Rather, states must show that economic consequences will be severe and that they will clearly outweigh positive economic consequences.

Senate Report at 14 (emphasis added). *See also* Senate Report at 18-19 ("[I]f the court finds for the tribe, it will order a 60-day negotiation period and may take into account public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities").

Congress' explicit recognition that one "objective" of IGRA is to balance competing economic interests, and its direction that federal courts may consider such competition in determining the states' good faith, is strong evidence that Congress adopted the Act in part under its interstate commerce power.[6]

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[6]Congress also balanced related concerns:

> After lengthy hearings, negotiations and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the *interests of both sovereign entities* are met with respect to the regulation of complex gaming enterprises such as parimutuel horse and dog racing, casino gaming, jai alai and so forth. *The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against the strong tribal opposition* to any imposition of state jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns. . . . In the Committee's view, both state and tribal governments have significant governmental interests in the conduct of class III gaming. . . . A state's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the state's public policy, safety, law and other interests, as well as impacts on the state's regulatory system, including its economic interest in raising revenue for its citizens. *It is the Committee's intent that the compact requirement for class III not be used as a justification by a state for excluding Indian tribes from such gaming or for the protection of other state-licensed gaming enterprises from free market competition with Indian tribes.*

Senate Report at 13 (emphasis added).

D. IGRA Regulates Non-Indian Economic Concerns

IGRA directly regulates state and commercial gaming interests by barring them from owning gaming projects on Indian lands. Specifically, the Act excludes all but Indian tribes from having a "proprietary interest and responsibility for the conduct of any gaming activity" on Indian land. 25 U.S.C. § 2710(b)(2)(A).

The Act also controls non-Indian economic concerns by regulating contracts between tribes and other entities related to the management of tribal gaming projects. *See* 25 U.S.C. § 2711. "As used in section 12 and throughout the bill, the term 'management contract' refers to agreements governing the overall management and operation of an Indian gaming facility by *an entity other than the tribe or its employees.*" Senate Report at 12-13 (emphasis added). IGRA generally limits the terms of management contracts, *see id.* at § 2711(b)(5), and generally limits the manager's fees. *See id.* at § 25 U.S.C. § 2711(c)(1). *See also* Senate Report at 8. Congress intended that these limitations on non-Tribal

entities apply retroactively to contracts that preexisted the Act:

> In the area of gaming where many factors other than ordinary business risk enter into the equation, the Committee has no reluctance in requiring changes to existing gambling enterprise contracts, whether or not such contracts have been given a stamp of approval by the Secretary.

Senate Report at 15.

IGRA's direct regulation of non-Indian economic concerns is further evidence that Congress adopted the Act, in part, under its interstate commerce power.

E. Indian Gaming Has a Substantial Effect on Interstate Commerce

In enacting IGRA, Congress found that "numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue." 25 U.S.C. § 2701(1). Congress also found that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." *Id.* at § 2701(4).

As Indian Tribes engage in the economic activities IGRA permits, they necessarily have a substantial impact on interstate commerce. Increased tribal self-sufficiency reduces tribal dependence on federal and state funding, programs, and support. This impacts interstate commerce by reducing federal and state expenditures, with related implications for federal taxation. Further, as an industry that had generated more than $100 million on a national aggregate basis as of 1988[7] — and which has continued to grow in the subsequent seven years — the Indian gaming industry impacts commerce directly by: (1) purchasing, leasing, and renting equipment and supplies from non-Indian businesses through interstate commerce; (2) employing thousands of non-Indians to help finance, design, construct, manage, and operate Indian gaming facilities; and (3) inviting and serving out-of-state non-Indian customers.

[7] *See* Senate Report at 20.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987), this Court recognized the potential scale of Tribal gaming projects and their impact not only on the Tribes but on the commerce it attracted:

> [Tribes engaged in gaming] have built modern facilities which provide recreational opportunities and ancillary services to their patrons, who do not simply drive onto the reservations, make purchases and depart, but spend extended periods of time there enjoying the services the Tribes provide. The Tribes have a strong incentive to provide comfortable, clean, and attractive facilities and well-run games in order to increase attendance at the games. The tribal bingo enterprises are similar to the resort complex, featuring hunting and fishing, that the Mescalero Apache Tribe operates on its reservation through the "concerted and sustained" management of reservation land and wildlife resources. *New Mexico v. Mescalero Apache Tribe*, 462 U.S., at 341, 103 S.Ct., at 2390. The Mescalero project generates funds for essential tribal services and provides employment for tribal members.

Id. at 219-20, 107 S.Ct. at 1093-94.

Where states have participated in the compact process, tribes and surrounding communities have dramatically realized the important economic benefits Congress intended

IGRA to afford.[8] Class III operations, which are only possible after a Tribal-State Compact has been reached,[9] vividly demonstrate the inevitable impact such activities have on commerce:

> In the states where Indian tribes and states have worked together on a government-to-government basis, the objectives of the IGRA have begun to materialize to the benefit of both governments. Tribes have used gaming revenues to provide better governmental services for tribal members, better health care, higher quality education and employment.

Oversight Hearings on the Need for Amendments to the Indian Gaming Regulatory Act: Hearing Before the Committee of Indian Affairs, 103rd Cong., 2d Sess. 69 (1994) (testimony of Ada E. Deer, Assistant Secretary, Indian Affairs, Department of the Interior) hereafter ("Senate Hearings"), Appendix at 5a. Better health care, education, employment and other social benefits to Indian reservations impact everyone, Tribes and states, Indians and non-Indians alike.

In Minnesota, for example, the number of welfare recipients — both Indian and non-Indian — under the federal Aid to Families with Dependent Children program decreased by 14 percent between 1987 and 1992 in eight non-urban counties with Indian gaming, whereas statewide the number of welfare recipients increased 17 percent for the same period. *See* Deloitte & Touche, *A Historical Review of Gaming in the United States*, Appendix to Senate Hearings, May 17, 1994, at 207, Appendix at 36a. Minnesota entered into compacts with tribes soon after IGRA was passed. As a study conducted for the amicus Minnesota Indian Gaming Association (MIGA) by KPMG Peat Marwick has documented, Minnesota witnessed remarkable growth of tribal self-sufficiency and freedom from federal welfare dependency. *Id.* Indian gaming has directly created nearly 10,000 jobs for Minnesotans, and has indirectly created an estimated 20,000 additional jobs. *Id.* Of particular significance in terms of Indian gaming's impact on commerce is the fact that approximately 7,600 of those jobs are supported by tourism expenditures. *Id.* A number of these jobs are being filled by persons who live more than 25 miles from the reservation, particularly where tribal lands are remote. *See* KPMG Peat Marwick, Minnesota Indian Gaming Association, *Economic Benefits of Tribal Gaming in Minnesota*

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[8] Sometimes the most important gains for tribes and their states have been in situations where compacts were reached reluctantly through litigation, where the Eleventh Amendment was not an impediment. *See, e.g., Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480 (W.D. Wis. 1991); *Sault St. Marie Tribe of Chippewa Indians v. Michigan*, 800 F. Supp. 1484 (W.D. Mich. 1992).

[9] The Bureau of Indian Affairs reports that as of January 26, 1995, 98 tribes in 22 states have entered into 114 Tribal-State compacts under IGRA. *See* Department of Interior, Tribal-State Compact List, January 26, 1995, Appendix at 2a. Despite the apparent success for both tribes and states once a compact is signed, most states which have signed compacts first compelled litigation or threatened sovereign immunity defenses if tribes sought relief under IGRA. Some states, like Washington, relying on the Eleventh Amendment, demanded that Tribes either accept a limited, generic "cookie cutter" compact dictated by the state and not the result of negotiations as Congress intended, or face years of litigation over the immunity issue. Meanwhile, tribal and congressional goals for self-sufficiency remain frustrated. Assistant Secretary Deer noted the difficulties caused by noncompacting states:

> In several non-Indian communities tribal gaming has proven to be a catalyst for their revitalization. In those states that have refused to negotiate with tribes, the tribes' efforts at achieving economic stability and self-sufficiency have been effectively frustrated.

Testimony of Ada Deer, Senate Hearings, May 17, 1994, at 69, Appendix at 4a.

1992, April, 1993, p. 14, Appendix at 68a. The impact on highway travel is obvious.

Similarly, a study conducted for the State of Minnesota to assist in its long-range planning determined that *15 percent (approximately 900,000) of the customers visiting Minnesota Indian casinos were from outside the state. See* Minnesota Planning, *High Stakes: Gambling In Minnesota*, March, 1992, at 12, Appendix at 77a. A 1993 update to that report observed:

> *Out-of-state visitors* to [Tribal government] casinos are having a *significant economic effect* on Minnesota. According to the Department of Trade and Economic Development these visitors were responsible for a $245 million dollar increase in the state's gross product and the creation of 7,600 jobs.

Minnesota Planning, Minnesota Gambling 1993, May, 1993, at 17, Appendix at 84a (emphasis added). The 1993 report noted that the number of out-of-state visitors had increased from 15 to 20 percent. *Id.* at 14, Appendix at 82a.

A survey of Tribal government gaming employees — again, both Indian and non-Indian — in Wisconsin revealed that 820 employees in 1992 had been welfare recipients prior to going to work for a tribe's gaming project, saving the state approximately $1.6 million and the federal government $1.4 million. *See* Deloitte & Touche, *supra*, at 209, Appendix at 38a.

Tribal governments account for approximately five percent of the American entertainment market related to gaming. While small in relative terms compared to the 34 percent market share held by private casinos and the 38 percent share occupied by state lotteries — the latter being by far the largest players in the gaming marketplace — tribal governments' gaming activities have a tremendous impact in absolute terms on Indian and neighboring communities. *Id.* at 187, Appendix at 16a. The size and breadth of Indian gaming projects where states have negotiated

tribal gaming compacts, and the impact of that activity on commerce, must be considered in determining what Congress was attempting to regulate under IGRA.[10]

In South Dakota, the impact tribal gaming projects have had on tourism is even more pronounced. In written testimony submitted to the Senate Hearings, Dr. Michael K. Madden, Professor of Economics, University of South Dakota, reported that prior to Indian gaming, aggregate travel spending in the five counties which now host tribal gaming projects totaled only about $8 million. By 1993, after the tribes began their class III operations pursuant to Tribal-State compacts,[11] travel spending had increased in those counties to about $31 million, an increase of 281 percent. *See* Madden, *Preliminary Estimates of Economic Impacts Related to Tribal Gaming in South Dakota*, Senate Hearings, May 17, 1994, at 246, Appendix at 87a. Professor Madden noted other benefits to Tribal and state economies:

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[10] As noted above, the Eleventh Circuit superficially dismissed the impact of Indian gaming on interstate commerce as irrelevant to Congress' purpose in enacting IGRA, but its analysis focused only on the control of organized crime:

> Congress' concern with organized crime was not that such activities would burden interstate commerce, but rather that prohibition of organized crime would "ensure that the Indian tribe is the primary beneficiary of the gaming operation, and . . . assure that gaming is conducted fairly and honestly by both the operator and the players." 25 U.S.C. § 2702(2). In addition, Congress wanted to criminalize the involvement of organized crime in order to "promote[ ] tribal economic development, self-sufficiency, and strong tribal government." 25 U.S.C. § 2702(1). In analyzing Congress' goals, it is clear that alleviating a supposed burden on interstate commerce was not among them.

Seminole, 11 F.3d at 1026. *See* discussion *infra* at Section III(F) of this brief.

[11] But not without substantial litigation delays. *See* fns. 8, 9, *Supra*.

> New wages and salaries in the regions surrounding the tribal casinos are estimated to be more than $25 million. Because most regions surrounding the tribal casinos are of low population, these added earnings have produced significant relative impacts on personal income within communities. . . .
>
> The use of [profits from tribally-owned casinos] vary from tribe to tribe. Some of the resources have been allocated to infrastructure improvements relating to the casinos themselves. Examples include lodging and camping facilities as well as additions to casino capacity. Other economic development programs have also been pursued. Training and educational programs for tribal members have been instituted or expanded within a number of the tribes.

Id. at 247, Appendix at 89a.

Perhaps the use of tribal gaming revenues in specific instances best illustrates IGRA's impact on commerce as well as on the tribes themselves. The Wisconsin Winnebago Nation has nearly 5,000 members, and was impoverished for many years. The opportunity to use gaming under IGRA's compacting process, as the Wisconsin tribes were able to do only after protracted litigation,[12] not only benefitted the Winnebago Nation in countless ways, but contributed significantly to the community around it. As Tribal Chair JoAnn Jones so eloquently explained to Congress:

> Indian gaming is not about gaming. It is about survival and bringing my people out of the third world conditions that they have lived in for generations. It is about sovereignty and the right of one government to operate free from the interference of another govern-

[12] *See Lac du Flambeau Band*, 770 F. Supp. 480.

> ment. Finally, it is about an agreement and compromise worked out among sovereign governments.
>
> When Congress established the National Indian Gaming Regulatory Act it said the Act had three purposes: Promote tribal economic development, self sufficiency, and strong tribal government. Indian gaming in Wisconsin is doing all of these things and more.
>
> The Winnebago Nation employs more than 2000 people. Nearly 80% of these people are employed at our gaming enterprises. Employment has quadrupled in the last two years. More than 60% of these employees are non-Indian. More than 300 of our gaming employees came from the welfare rolls. Statewide, Indian gaming jobs took 800 people off welfare and 1400 more from the unemployment rolls. Casino income is the sole support for the families of nearly 80% of the casino employees. According to [state] Health & Social Service Secretary Gerald Whitburn, state aid to Indian families has dropped. He says that Indian gaming is a major reason for this drop.

Testimony of JoAnn Jones, Tribal Chair, Wisconsin Winnebago Nation, Senate Hearings, April 26, 1994, at 68, Appendix at 96a-97a.

In Michigan, the Sault St. Marie Tribe of Chippewa Indians, with a citizenship of approximately 20,000 members, has experienced similar results, most of which came after the State of Michigan, following extended periods of negotiation and litigation (in this instance spanning five years), entered into Tribal-state compacts.[13] The Tribe is the sole owner and operator of all its gaming operations. *See* Testimony of Bernard Bousher, Tribal Chairman, Senate Hearings, April 27, 1994, at 118, Appendix at 101a. Like the

[13] *See Sault St. Marie Tribe of Chippewa Indians*, 800 F. Supp. 1484.

Wisconsin Winnebago Nation, which employs over 300 persons in connection with surveillance, security and internal accounting controls,[14] the Sault St. Marie Tribe has invested substantial resources in order to satisfy the congressional mandate of providing gaming entertainment that is conducted fairly and honestly, not only for the Tribe, but for the customers as well. Bousher at 119-120, Appendix at 103a-105a. *See* 25 U.S.C. § 2702(2). And as with tribes in other states, many of Sault St. Marie's patrons are tourists, thus developing the economy of the reservation as well as for the entire community. *See, e.g.*, Letter from Sault Area Chamber of Commerce to Governor John Engler, dated May 13, 1993, Senate Hearings, April 26, 1994, at 202, Appendix at 108a-109a. Mayor Bruce J. Dodson of nearby St. Ignace, Michigan, reports that in an area of 47 percent unemployment, "every able bodied person is now working in a three county area . . . the Tribe has certainly been one of the main contributors." Senate Hearings, *supra*, at 203, Appendix at 112a.

In New York State, the Oneida Nation, which had a 44 percent unemployment rate in 1990, is now the second largest employer in Central New York. *See* testimony of Gaiongwilode, Tribal Chairman, Senate Hearings, July 19, 1994, at 226, 243, Appendix at 117a-120a. The Oneida Nation's transformation has been typical of other tribes which finally obtained the Tribal-State compact Congress envisioned:

> Thanks to revenue from the casino, the Nation is able to house, feed, and educate its people, to nurture and enhance the Oneida's unique culture, to repossess ancestral homeland, to significantly benefit the local community, to research and develop other business

[14] Jones Testimony, *supra*, at 67, Appendix at 94a.

> enterprises, and to otherwise provide for the seven generations yet to come as our culture requires us to do.

Id. at 227, Appendix at 117a.

Indeed, while the effect of Indian gaming on surrounding communities, the states, and commerce generally has been significant, and clearly was within Congress' sights when it enacted IGRA, the uses of gaming revenues on the reservations themselves have reinforced the importance of tribal participation for governmental purposes in this burgeoning aspect of the entertainment and leisure industry. According to the MIGA study, for example, in 1992 Minnesota Tribes provided over $17 million for tribal housing, $39.5 million in direct services, and $800,000 in charitable donations. Another $4 million was generated for human services and tribal educational programs. *See* MIGA Study, at 10, Appendix at 64a.

Thus it is apparent that — just as Congress anticipated — Indian gaming has had a substantial impact on interstate commerce.

F. Congress Enacted IGRA, in Part, to Combat Organized Crime

Congress declared that IGRA's purpose is, in part, "to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that the gaming is conducted fairly and honestly by both the operator and players. . . ." 25 U.S.C. § 2702(2).[15]

[15] Congress' concern with crime and law enforcement is palpable in the Senate Report. *See* Senate Report at 20 ("The need for Federal and/or state regulation of gaming, in addition to, or instead of, tribal regulation, has been expressed by various state and Federal law enforcement officials out of fear that Indian bingo and other gambling enter-

See also Senate Report at 13 ("The purpose of the Act is to provide a statutory basis for operating Indian gaming, to promote economic development, to shield tribes from organized crime"). Reading these three distinct purposes as if they were one, the Eleventh Circuit concluded that Congress' only concern with "organized crime" was that it might prevent Indian tribes from being the primary beneficiary of the gaming operation: "In analyzing Congress' goals, it is clear that alleviating a supposed burden on interstate commerce was not among them." 11 F.3d at 1026. There are at least three problems with the Eleventh Circuit's reasoning.

First, section 2702(2) plainly sets forth three distinct, though related, purposes. For example, it is conceivable that an Indian tribe might not be the primary beneficiary of gaming activity even in the absence of organized crime. Similarly, fair and honest gaming does not insure that the Indian tribe is the primary beneficiary of the gaming activity. Second, the Eleventh Circuit's interpretation of section 2702(2) suggests that the presence of organized crime in Indian gaming is perfectly acceptable so long as the Indian tribe remains the primary beneficiary of the gaming activity. It is difficult to imagine Congress embracing such a notion. Third, if the lower court's interpretation were cor-

prises may become targets for infiltration by criminal elements"). *See also id.* at 5 ("Representatives of states with experience in regulating some forms of gaming activities, such as Nevada and California, have expressed concern over the potential for the infiltration of organized crime or criminal elements in Indian gaming activities. The criminal division of the U.S. Department of Justice has expressed similar concerns, although as stated in the additional views of Senator John McCain, in 15 years of gaming activity on Indian reservations, there has never been one clearly proven case of organized criminal activity"); *id.* at 6 ("the Committee has carefully considered the law enforcement concerns of tribal and state governments, as well as those of the Federal Government, and the need to fashion a means by which differing public policies of these respective governmental entities can be accommodated and reconciled").

rect, Congress' repeated use of commas[16] and the word "to" before each of the three purposes stated in 25 U.S.C. section 2702(2) would be surplusage. That result "violates the established principle that a court should 'give effect, if possible, to every clause and word of a statute.' " *Moskal v. United States,* 498 U.S. 103, 109-110, 111 S.Ct. 461, 466 (1990) (*quoting United States v. Menasche*, 348 U.S. 528, 538-39, 75 S.Ct. 513, 519-20 (1955)). In sum, the Eleventh Circuit read section 2702(2) too narrowly. Congress plainly intended IGRA to, *inter alia*, combat organized crime.

Congress has expressly found that " 'organized crime is interstate in character,' " *Perez*, 402 U.S. at 147 n.1, 91 S.Ct. at 1358 n.1 (*quoting* 18 U.S.C. § 891, Notes), and that "[o]rganized crime operates on a national scale." *Id.* at 150, 91 S.Ct. at 1359. Consistent with this fact, Congress has long enacted criminal statutes under its interstate commerce power. *See, e.g., Caminetti v. United States,* 242 U.S. 470, 37 S.Ct. 192 (1917) (White Slave Traffic Act); *Champion v. Ames*, 188 U.S. 321, 23 S.Ct. 321 (1903) (Federal Lottery Act); *United States v. Jarrett*, 705 F.2d 198, 202-03 (7th Cir. 1983) (Hobbs Act); *United States v. Martino*, 648 F.2d 367, 381 (5th Cir. 1981) (Racketeer Influenced and Corrupt Organizations Act); *United States v. Cappetto*, 502 F.2d 1351, 1356 (7th Cir. 1974) (1975) (Organized Crime Control Act).

Congress has also criminalized the manufacture, recondition, repair, sale, transport, possession, or use of gambling devices in interstate commerce. *See* Johnson Act, 15 U.S.C. §§ 1171-1178. The Johnson Act expressly applies in Indian country. *See id.* at § 1175. IGRA provides, however, that 15 U.S.C. section 1175 does not apply to any gaming con-

[16]Congress' use of commas between the three purposes set forth in section 2702(2) indicates a "separation of sentence elements . . . [or] items in a series . . ." Webster's New Twentieth Century Dictionary, unabridged, at 362 (2d ed. 1983).

ducted under a Tribal-State compact that is in effect and is entered into by a state in which gambling devices are legal. *See* 25 U.S.C. § 2710(d)(6). *See also* Senate Report at 15. Thus Congress, pursuant to its interstate commerce power, was concerned with gaming devices, and chose to allow the Johnson Act prohibitions to remain in effect absent a class III compact satisfying the requirements of 25 U.S.C. section 2710(d)(6).

Related to its concerns regarding organized crime was Congress' determination that tribes adopt exclusionary standards of suitability for "primary management officials" and "key employees." *See* 25 U.S.C. § 2710(b)(2)(F) (made applicable to class III gaming at 25 U.S.C. § 2710(d)(1)(ii)). Those employees must meet criteria relating to the "public interest" and the effective regulation of "gaming." *Id.* at § 2710(b)(2)(F)(ii)(II).

In sum, Congress' concerns about organized crime and gaming industry integrity standards further demonstrate the interstate commerce nature of IGRA, and the error committed below in rejecting those factors.

IV. CONCLUSION

IGRA was enacted in part to address Congress' concern with issues that arise under its Interstate Commerce Clause authority. The Eleventh Circuit Court of Appeal's conclusion that respondent State of Florida is entitled to a judgment of dismissal because there was no exercise of that authority was in error and should be reversed, and the case remanded for further proceedings under IGRA.

Respectfully submitted,

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March 31, 1995

Appendix 1

TRIBAL-STATE COMPACT LIST

TRIBAL INFORMATION FOR THOSE WITH
APPROVED TRIBAL-STATE COMPACTS
AS OF JANUARY 26, 1995

98 TRIBES — 22 STATES — 114 COMPACTS
24 AMENDMENTS/ADDENDUMS

THIS LIST IS UPDATED AS NEW COMPACTS/AMENDMENTS ARE PUBLISHED IN THE FEDERAL REGISTER BY THE INDIAN GAMING MANAGEMENT STAFF, OFFICE OF THE COMMISSIONER, BUREAU OF INDIAN AFFAIRS, (202) 219-4068

* Tribe has compact(s) with more than one state.
** Tribe has more than one compact for different types of games.

Appendix 2

INDIAN GAMING REGULATORY ACT

HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARING ON THE NEED FOR
AMENDMENTS TO THE
INDIAN GAMING REGULATORY ACT

MAY 17, 1994
WASHINGTON, DC

PART 3

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF ADA E. DEER, ASSISTANT SECRETARY, INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR,

Good Afternoon Mr. Chairman and members of the Committee, I am pleased to be here with you today to share with you the experiences of the Department of the Interior in administering provisions of the Indian Gaming Regulatory Act (IGRA). I am accompanied by Mr. John Duffy, Counselor to the Secretary, who will present the Department's testimony.

I do however, want to make some general comments on Indian gaming before Mr. Duffy offers the Department's testimony. The President's remarks in his historical meeting with the tribes, the follow-up Listening Conference and my 10 months as Assistant Secretary all make clear that tribe-owned gaming is an important economic development activity for Indian tribes.

In the States where Indian tribes and the States have worked together on a government-to-government basis, the objectives of the IGRA have begun to materialize to the benefit of both governments. Tribes have used gaming revenues to provide better governmental services for tribal members, better health care, higher quality education and employment. In several non-Indian communities tribal gaming has proven to be a catalyst for their revitalization. In those States that have refused to negotiate with tribes, the tribes' efforts at achieving economic stability and self-sufficiency have been effectively frustrated. Moreover, in some highly publicized conflicts, protracted and costly liti-

gation has resulted creating a major disincentive for tribes and States to work cooperatively.

Second, while at times tribes may feel overwhelmed and frustrated, I believe they have shown great determination, hope, and in most cases, willingness to work with the States to reach amicable resolutions.

Although the implementation of the IGRA has sometimes been contentious and difficult, overall our experience has been positive. To date we have approved 107 compacts, 12 amendments representing agreements between 90 tribes and 19 states.

In closing I want to say that we will continue to support Indian gaming as an important means of economic development. And, as Assistant Secretary, I am prepared to work with the tribes in their efforts to provide direction and leadership on this critical issue.

Thank you.

Appendix 3

INDIAN GAMING REGULATORY ACT

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BEFORE THE
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ON

OVERSIGHT HEARING ON THE NEED FOR
AMENDMENTS TO THE
INDIAN GAMING REGULATORY ACT

MAY 17, 1994
WASHINGTON, DC

PART 3

Deloitte &
Touche

A Historical Review of Gaming in the United States

April 26, 1994



NIGA

National Indian Gaming Association



Chairman
Rick Hill
Oneida Tribe of Indians

Vice Chairman
Daniel Tucker
Sycuan Band of Mission Indians

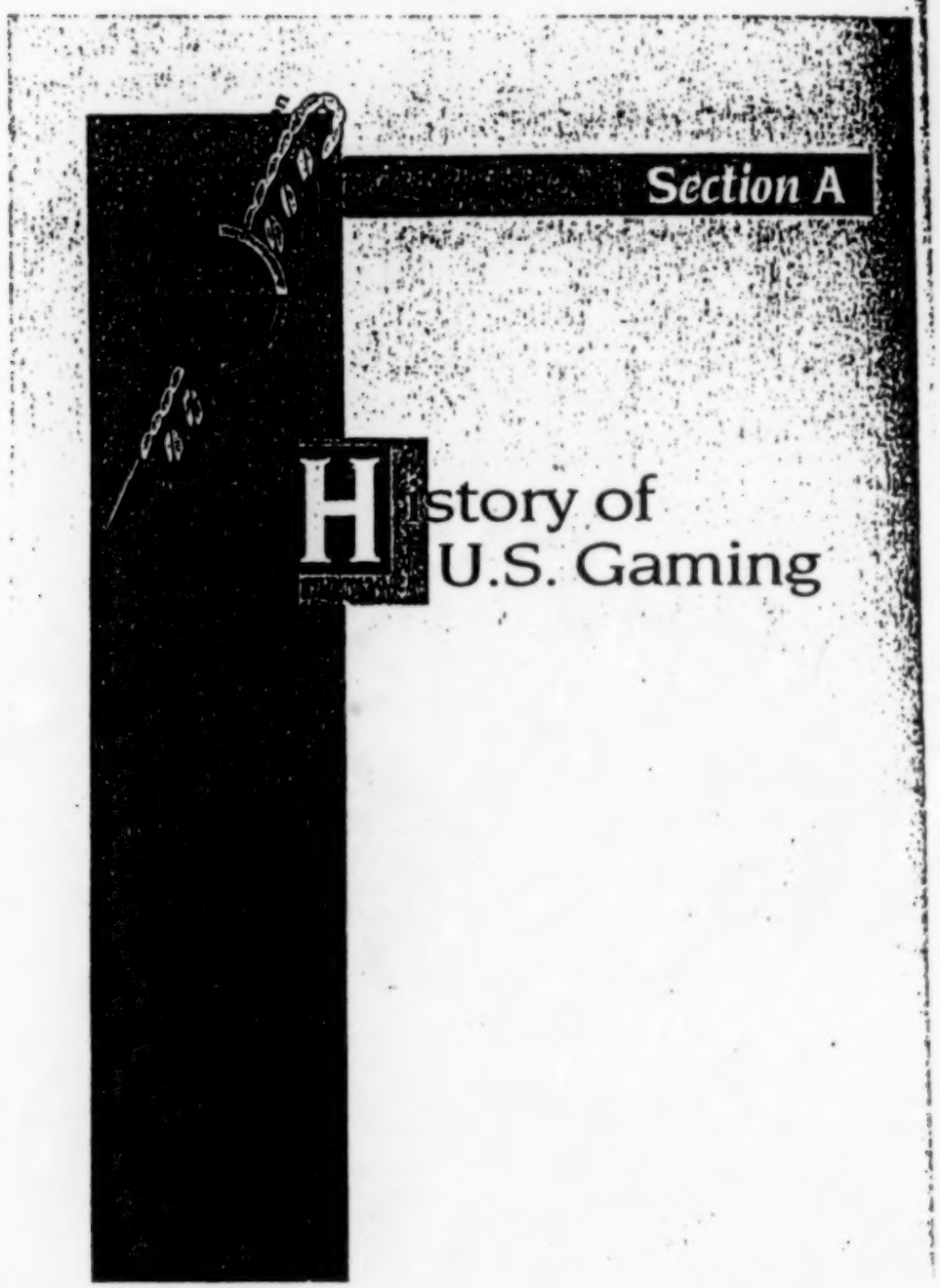
Treasurer
Nathan Small
Shoshone Bannock Tribe

Secretary
Jake Viarrial
Poloaque Pueblo

904 Pennsylvania Avenue, SE
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(202) 546-7711 • Fax (202) 546-1755

Executive Director
S. Timothy Wapato
Colville Confederated Tribes

Public Relations Director
A. Gay Kingman
Cheyenne River Sioux



HISTORY OF US GAMING

Origins of U.S. Gaming

The United States is in what has been referred to as the "third wave" of legalized gaming, in that this is the third time that gaming, in one form or another, is available virtually everywhere in America. The first wave of gaming began in the colonial era and lasted through the Civil War. The second wave began after the Civil War and lasted through the early twentieth century when most forms of gaming throughout the U. S. were banned. The third wave began in 1964, with the passage of legislation legalizing a lottery in New Hampshire.

Lotteries dominated the first wave and were used to help finance the colonization of America. As such colonization took place, the popularity of the lotteries increased and they were used to finance projects too massive for traditional government or private financing sources. Institutes of higher learning such as Harvard and Princeton were financed in part from tax proceeds generated by lotteries.

The nation's first lotteries were considered respectable and not a form of gaming, but rather, a voluntary form of tax collection patronized by the most respectable citizens. By 1831, lotteries were sponsored by eight states and wagers exceeded $66 million, five times the annual federal budget. By the time the Civil War started, scandals and swindles plagued the lotteries and a wave of morality swept the nation. This soon led to the abolition of lotteries, and the first wave of legalized gaming receded.

The second wave of legalized gaming followed the Civil War. Lotteries made a comeback and other forms of gaming proliferated. This comeback was the strongest in the Reconstructed South as a means of dealing with the extreme financial difficulties that resulted from the war. Gaming also

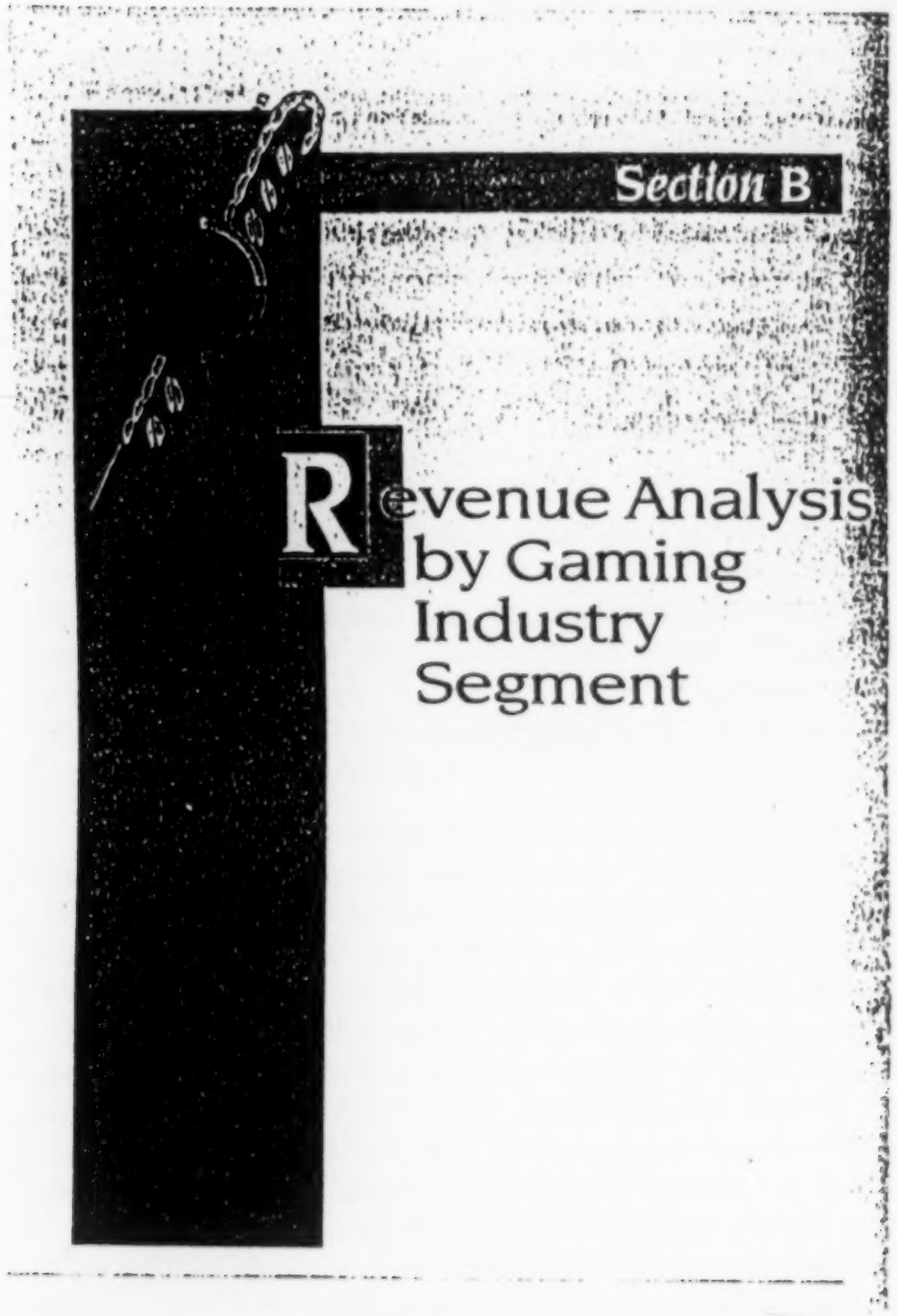
thrived in the frontier cities of the West and in most major urban areas.

During the 1840s and 1850s, the gold and silver strikes in California and Nevada caused an influx of miners and others into those territories. Gaming became an integral part of the boomtown atmosphere. Gaming also thrived in the cities of San Francisco, Kansas City and Denver, all of which were known as gaming capitals in the 1850s. During this period, anti-gaming legislation was passed but was not effective and only served to drive gaming underground where it was tolerated if not supported by law enforcement officials.

However, the second wave did not persist, and by 1910, the year Nevada banned casinos, legal gaming was virtually non-existent in the U.S. By the 1930's casinos had returned to Nevada and horse race wagering had returned to twenty-one states. Lotteries were not legalized again until 1964 when such activity was legalized in New Hampshire, and, according to some experts, this ushered in the third wave of legalized gaming in America.

Despite a weak economy the gaming industry in the U.S. has exhibited an impressive growth rate. The morality argument has lessened as governments and churches become big players. The industry has become a huge economic and social force. Players are demanding faster and easier games. This fundamental value shift is currently changing the form gaming takes across the country. Gaming is legal in one form or another in every state (including the District of Columbia) except Utah and Hawaii. Land based casino gaming (including casinos on Indian Reservations) is offered in 20 states. In addition, Indian tribes in Florida and New Mexico operate electronic games such as video poker without compacts because the states have refused to negotiate with the tribes. Excursion boat (riverboat gaming) is legal in Illinois, Indiana, Iowa, Louisiana, Missouri, and Mississippi. Every other state with a major waterway, or

lake is considering riverboat gaming. 38 states (including Washington D.C.) permit lotteries and remaining jurisdictions where gaming is legal offer various forms of pari-mutuel wagering.



REVENUE ANALYSIS BY GAMING INDUSTRY SEGMENT

1992 gaming revenues or win exceeded $29.9 billion a volume that would rank 19th in the Forbes Sales 500, ahead of American Express ($26.96 billion) and behind Boeing ($30.184 billion). Lotteries and casinos dominate the US legal gaming industry accounting for approximately 38% and 34% respectively, of total 1992 gaming revenues. Pari-mutuels are next in revenue market share at approximately 12%. Indian Reservation gaming accounts for 5% of revenue market share. Charitable games, bingo, card rooms, and legal bookmaking account for the remaining 11% of market share (see exhibit B).

Consumer preference for higher priced lottery games, continued interest in OTB and slot machines over lower priced alternatives such as race tracks and table games changed the composition of gross gaming revenue. This also increased the average consumer price of gaming from 8.77% of handle in 1991 to 9.07%.

Gross gaming revenue comprised .592% of US personal income versus .552% in 1991. Consumer expenditures (losses) on legal gaming were 6 times greater than the $4.9 billion Americans spent on box office receipts.

Indian Reservation Gaming

Class III Indian Reservation gaming experienced significant growth in revenues. Revenues totaled $1.07 billion, with an estimated (256%) or $769 million increase since 1991. When combined with Class II revenues, mostly bingo, the gross gaming revenue totaled $1.5 billion producing an overall gain in revenues of 108%, or $779 million. Exhibit C clearly illustrates the growth in Indian gaming since the passage of the Indian Gaming Regulatory Act (IGRA) in 1988. Although Indian gaming revenues are increasing at a tremendous pace, Indian gaming revenues are still a small

percentage of total gaming revenues. Exhibits A & B illustrate market shares for 1991 and 1992. Exhibit D clearly shows that the size of Indian gaming revenues is still small as compared to total gaming revenues (comprising 5% of total revenues).

There has been some confusion about the actual scale of Indian Gaming. A widely talked about figure of $6 billion was publicized. "Gaming and Wagering Business" magazine attributes this projection to a possible misunderstanding regarding gambling terminology. Indian casinos win 18% of drop. Therefore, a $6 billion drop would equate to a $1.08 billion win which is in line with the original estimate.

Casinos

Casinos won $11.2 billion an increase of $1.1 billion since 1991. Class III Indian Gaming the majority which is generated by casino games comprised $1.1 billion of the total casino revenues. However, lotteries still comprised the largest share (38.3%) of the pie but not by a significant amount.

Slot machines in Nevada and New Jersey, cruise ships, riverboats and land based casinos were all strong performers. The tend in the mix of casino gaming is moving away from table games to higher margin slot machines. Slot machines represented 47% of total Nevada and New Jersey casino gaming revenues in 1982 versus 65% or $5.83 billion in 1992.

Lotteries

There have been many changes in the lottery market. It is now comprised of three primary venues: traditional state number games, instant games, and video lottery terminals. Since its reintroduction into the US in 1964, the state lottery has been the engine that has powered the resurgence of legal gaming:

- 38 states including Washington DC permit state lotteries.
- Lotteries are available to more than 80% of the US population.
- Thus far, lotteries have been economically successful and relatively free of scandal popularizing and sanitizing the game in general.

Aggregate gross revenues from lotteries reached $11.5 billion, a record 12% increase, a $1.2 billion increase from 1991.

Texas, Georgia, and Nebraska began lotteries in 1992-3. The successful start of lottery operation in Texas generated a first year handle which topped $1 billion.

The traditional lottery market is approaching maturity. Lotteries are diversifying their product lines. The continued success is highly dependent upon aggressively marketing lottery games and stimulating the market by diversifying their product lines.

Video poker and keno will play a key role in the future of lotteries. Video lottery revenues were up 99% or $120.4 million in 1992.

Non-Bingo charitable games

Non-bingo charitable games include pulltabs, punchboards, raffles, low-stakes blackjack and other card and dice

games. Gross revenues increased by 4.5% or $55.6 million to a total of $1.3 billion.

Bingo

Gross revenues from non-Indian bingo halls increased 2.2% to $1.09 billion. This revenue figure is an estimated figure based on the reported revenues. Each state has different laws regarding the reporting requirements and therefore it is probable that there are instances where revenues have not been reported.

Industry experts believe this market has matured. However, bingo players stay extremely loyal to their game.

Pari-Mutuels

Pari-mutuel wagering is generally considered to include on-track, off-track, and inter-track betting on horse racing, dog racing and Jai-alai. Currently, some form of pari-mutuel wagering is authorized in all the U.S. states except Alaska, Georgia, Hawaii, North Carolina, South Carolina, Utah, and the District of Columbia. All of the states with pari-mutuel wagering have some form of horse racing, approximately 17 states have greyhound racing, and Jai-alai wagering is in operation in just three states, Florida, Rhode Island and Connecticut. Pari-mutuel wagering accounted for 12% of total US gaming revenues in 1992. Gross pari-mutuel revenue rose slightly (.4%) by $16.1 million to $3.7 billion.

Major innovations in the industry have been off-track betting, inter track betting and simulcasting races to other venues, such as casinos. Off-track horse revenues increased by 12.8% to $110.2 M. Off-track betting comprises 33% of the industry's revenues and the share continues to rise. These innovations have made pari-mutuel wagering more accessible to bettors, however several studies have shown that the main effect has been to increase the amount wagered by existing patrons versus attracting new attendees.

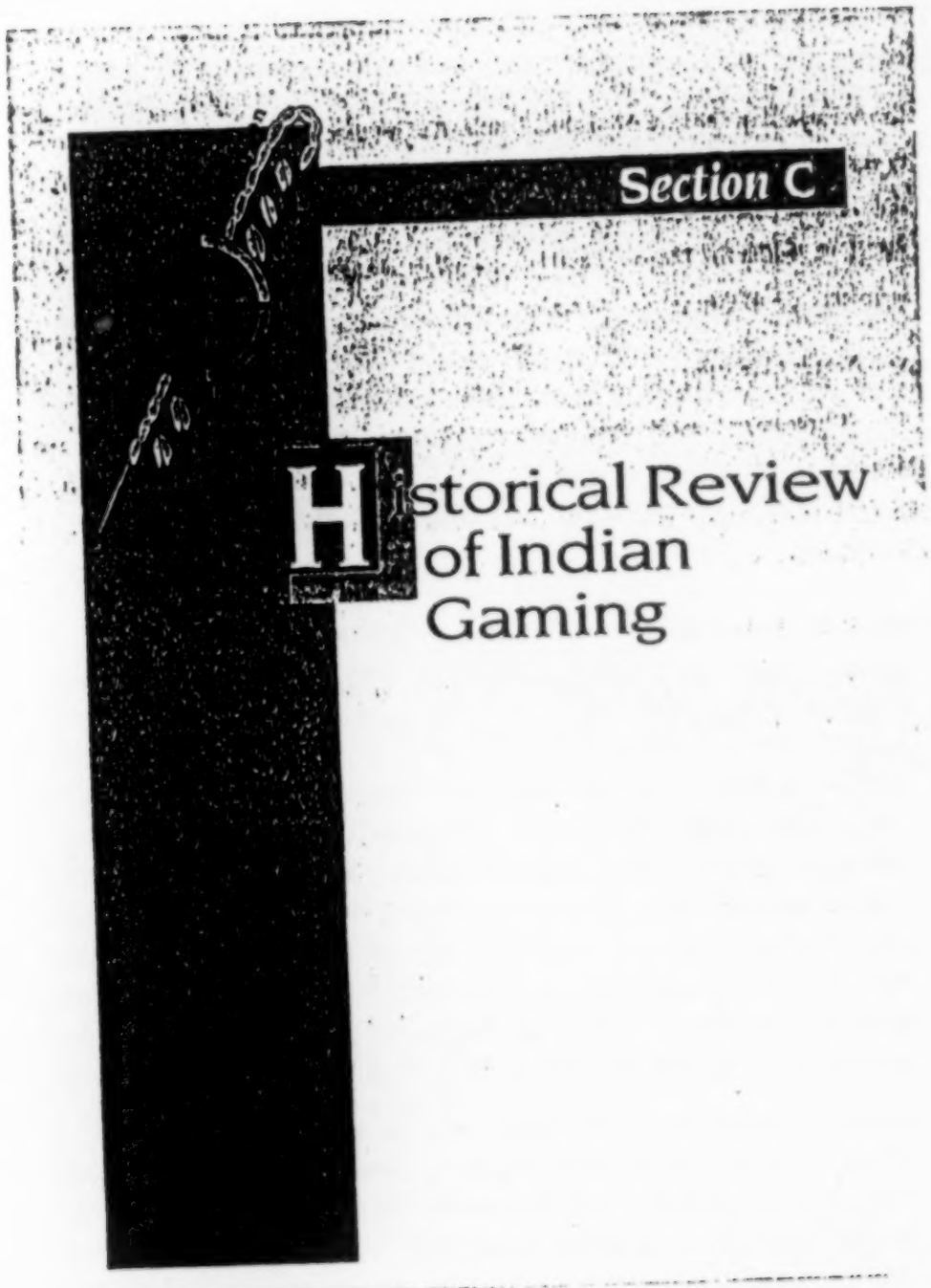
The pari-mutuel industry has been losing its share to other gaming industry segments and experienced low growth in total revenues from 1982-1992 (exhibit E). The pari-mutuel industry will require new and creative marketing approaches to hold their share of the market.

Non-Nevada Cardrooms

Cardroom revenues increased slightly in 1992, by less than $1.7 million, to $661 million. Most of these operations are small but there are many. There are approximately 300 in California alone. However, revenues in those California cardrooms have stabilized in 1992. Poker-like versions of pai-gow and super pan-nine and similar games are the major attractions.

Legal Bookmaking

This market share appears to have matured. Sports bets fell $9.98 million in 1992 to a three year low of $97.4 million.



HISTORICAL REVIEW OF INDIAN GAMING

Introduction

American Indian Nations embrace a distinct culture, language and spirit. Casino gaming has been referred to many as the "return of the buffalo". The buffalo was used by the American Indian people for total subsistence, food, shelter, clothing, children's games, and trading.

Gaming has replaced the buffalo as the mechanism used by American Indian people for survival. Today, the proceeds from gaming are used by Indian Nations for subsistence, cultural preservation, and to replenish impoverished economies. Not surprisingly, the spread of Indian Gaming has spurred controversy. As Indian casinos became more successful, competitors have lodged charges of unfair advantages and organized crime infiltration. During a 1992 Senate hearing on Indian Gaming, Paul Maloney, senior counsel at the Department of Justice, testified that a special investigation uncovered no evidence of organized crime infiltrating Indian gaming. In all cases of crime or robbery, Tribal governments have brought the crime to justice. Opponents accuse Indians of exploitation; that they are using gaming as a means to provide short-term financial growth and enormous benefits. Proponents refer to the intent of IGRA when allegations of exploitation are raised.

The primary intent of IGRA is to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self sufficiency, and strong tribal governments". Under IGRA, all revenues from gaming operations are required to be used solely for governmental or charitable purposes. Gaming revenues are used to build infrastructure, schools, hospitals, roads, sewers, and water systems and to fund health care and education.

Many reservations do not have sufficient resources and are located in undesirable regions that cannot support devel-

opment. These tribes have become dependent on federal aid, as attempts at economic development have failed prior to the advent of Indian gaming.

Government aid provided to Indians often result in benefiting local communities. This is due to the fact that there is a scarcity of Indian businesses and high unemployment, sometimes as high as 80%. A significant portion of the federal dollars are therefore spent outside the reservation.

The lack of a vital economy on reservations makes it nearly impossible to improve tribal conditions. This hopeless environment and constant struggle help to explain the high incidence of alcoholism and suicide, and the lack of adequate health care in many tribal communities. According to the 1990 Census, the poorest counties in the United States are located on Indian Reservations. There are also 3,200 counties in the United States. Of the Poorest 1% (32 counties), 7 are located on Sioux reservations in South and North Dakota. In addition, several other Indian Reservations in various counties in the United States were also listed amongst the 32 poorest counties.

More recently, gaming has enabled a few tribes to improve their situations considerably. The profits are used to build road and water systems and healthcare centers, provide job training scholarships and both home and business loans to tribal members. More tribes will benefit from gaming with the proliferation of Indian gaming operations. Currently, there are 547 tribes of which only 79 (14.4%) have Class III gaming.

Legislative and Regulatory Issues

Indian Tribes are sovereign governments. They have existed as sovereign governments long before Europeans settled in North America. Treaties signed with settlers in exchange for land guaranteed the tribes continued ability to be recognized and treated as sovereign entities. However,

historically state governments have been hostile in recognizing Indian Tribes as independent entities.

Under the constitution of the United States, the federal government is obliged to protect tribes from states, who have often coveted the Indian's lands and assets, and sought to impose power over Indian tribes and people.

Several landmark court cases have confirmed this recognition of Indian sovereignty. These court cases include, *Cherokee vs. Georgia, 1831,* and *California v. Cabazon, 1987.* The Indian Gaming Regulatory Act (IGRA), passed by Congress in 1988, affirms that tribes have the power to conduct gaming on Indian lands subject to tribal/state jurisdiction.

Indian Gaming was conducted on many reservations throughout the US prior to the passage of Indian Gaming Regulatory Act (IGRA). This legislation was passed in response to a 1987 federal court decision "California versus Cabazon" which stated that tribes could engage in forms of gambling that were not expressly prohibited by the state in which the tribe is located. The "California versus Cabazon" case and US supreme court finalized the distinction in which the court applied a criminal/prohibitory — civil/regulatory distinction. In other words, if a state regulates gaming, in any form, then gaming falls under civil law for which Indian nations cannot be prosecuted and the state is obligated under federal law to enter into compact negotiations with the tribe. If a form of gambling sought by a tribe is expressly prohibited by the state under criminal law, then the state can refuse negotiations for particular games on that basis. The Cabazon case solidified issues surrounding gaming on tribal lands which had previously been questioned.

The purpose of IGRA was to create a balance between the tribe's right to conduct gaming on their reservations and the public interests of the states in which the tribes are

located. IGRA became effective on October 17, 1988. The goals of the act include tribal economic development, self-sufficiency and a strong tribal government. The act provides a framework by which the games are conducted to protect both the tribes and the state. The act created three classes of gaming and allocated regulatory jurisdiction over each class among tribal, federal, and state sovereigns.

- Class I — includes social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals and is subject to exclusive tribal regulatory jurisdiction.
- Class II — includes all forms of bingo and other games similar to bingo, such as pull-tabs and punch-boards (electronic or non-electronic), provided these are played in the same location as bingo games. Class II also refers to non-banking games that either expressly allowed or not expressly prohibited by state law and banking card games in existence in the specified states of Michigan, North Dakota, South Dakota, Montana, and Washington State on or before May 1, 1988. Class II gaming is subject to tribal regulatory jurisdiction, with extensive oversight by the National Indian Gaming Commission (NIGC).
- Class III — includes all forms of gaming that are not Class I or II, including slots, casino games, banking card games, horse and dog racing, pari-mutuel wagering and jai-alai. Class III gaming is lawful on Indian lands only if the gaming has been authorized by a tribal ordinance approved by the chairperson of the NIGC and such gaming is permitted by the state for any purpose by any person, organization, or entity, and is conducted in conformance with a tribal-state compact entered into by the tribe and the state that is in effect. The tribal-state compact entered into by the tribe was proposed by the Nevada congressional delegation on

behalf of the states. The jurisdiction over class III gaming is left to the tribal-state compact negotiation.

The sovereignty of American Indian tribes was limited by IGRA which required a tribe to negotiate a compact with the state. Under IGRA, a tribe must request a state to enter into compact negotiations. Once a request is made, the state has an obligation to negotiate in "good faith" to enter into a compact. The compact must also be approved by the Secretary of the Interior. Jurisdiction is provided to the federal district court concerning the following:

- Any cause of action by a tribe arising from a state's failure to conduct negotiations in good faith.
- An action by a state or a tribe to enjoin any class III activity conducted in violation of the compact.
- Any cause of action initiated by the Secretary of the Interior to enforce the Secretary's authority under IGRA to enforce mediation procedures.

Today, there have been law suits because some states have failed to live up to IGRA and negotiate in "good faith" with tribes. There have been a number of landmark cases prompted by the proliferation of Indian Gaming. These cases have clarified gaming issues that IGRA addressed. Some of the major cases are summarized below:

Mashantucket Pequot Tribe versus
State of Connecticut, 1991

This decision involved the first interpretation of IGRA. The tribe filed suit in accordance with IGRA requiring the state of Connecticut to negotiate terms for operating games of chance on its reservation. The state agreed that "its limited authorization of the conduct of Las Vegas nights by nonprofit organizations does not amount to a general allowance of such (casino-style) gaming as the tribe would institute, and further that such gaming activity is contrary to

the State's public policy." The court determined that the issue was whether the form of gaming sought by the tribe violated the State's public policy.

The court reiterated what was stated in the Cabazon case. "If the intent of state law is generally to prohibit certain conduct, it falls within the areas of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory."

The court reasoned that since the state permits certain casino style games at charity events, the Mashantuckets use was within the meaning of IGRA, and not against public policy of the state. The court held that the state was required to enter into a compact with the Pequot tribe and that the games conducted in Las Vegas nights were subject to negotiations as were the rules of conduct for these games.

Lac Du Flambeau Band of Lake Superior Chippewa Indians Versus Wisconsin, 1991

In this case the tribe filed suit against the state under IGRA because the state failed to negotiate in good faith for a gaming compact. The court concluded that "the state is required to negotiate with the plaintiffs over the inclusion in a tribal state compact of any activity that includes the element of prize, chance, and consideration and that is not prohibited expressly by the Wisconsin Constitution. The state is required to negotiate casino games such as video, slot machines, and blackjack with the tribes because the activities are permitted under Wisconsin law within the meaning of IGRA."

The Cabazon case finalized the legal distinction between criminal/prohibitory and civil/regulatory. In this case it was determined that Wisconsin's gaming structure was regulatory in nature. The central issue in this case was whether the state "expressly permits" the type of gaming which the tribe

was seeking to conduct. The Federal court said that the "inquiry" is whether Wisconsin *prohibits* those particular gaming activities. It does not."

Seminole Tribe of Florida vs. Lawton Chiles, Governor of the State of Florida, 1994

This case was first filed in the Southern District of Florida on September 19, 1991. The Seminole Tribe brought suit against Lawton Chiles, Governor of Florida, to remediate the alleged failure of the State of Florida to conduct good faith negotiations for the tribe to establish gaming operations on their land. The State of Florida dismissed the claims on two grounds, 1) Gaming activities proposed by the Seminole Tribe are not conducted in the State of Florida. 2) Pursuant to the Eleventh Amendment, Congress does not have the constitutional power to enforce "good faith" requirement of the compact process by explicitly providing the Tribe a judicial remedy against the state.

On June 18, 1992, the final ruling sided with the Seminole tribe. The Florida Federal Judge ruled that the Eleventh Amendment was not a justifiable defense by the states. The Tribe's central argument against Florida's rebuttal was that IGRA abrogated the State's immunity when it enacted IGRA. This ruling was important in that it found that Congress has the power to abrogate State immunity. Subsequently, interlocutory appeal ensued. The appeal resulted in a finding that Congress did not have the power to abrogate state immunity, but the tribes should have remedy in "bad faith" cases. Therefore, the Secretary of the Interior was directed to implement procedures for the tribes in lieu of a compact with the states.

The State's Use of the 10th and 11th Amendments

Congress included a provision in IGRA that the states and tribes negotiate a compact for those games being

considered by the tribe. The states have responded to IGRA by using the 10th and 11th amendments to block the establishment of Indian Gaming Facilities. The state's basic strategy is to refuse to negotiate all or certain kinds of Class III games (such as slot machines, card games, pari-mutuel racing etc.). If a tribe feels the state has failed to negotiate in good faith, IGRA says that the tribe can sue the state for failure to negotiate.

The states have been using the 10th amendment as a defense because it reads the powers not delegated to the federal government by the constitution are reserved for individual state governments. The state therefore cannot be compelled by the federal government to act on anything that is not stated in the constitution. This is disputed by the tribes.

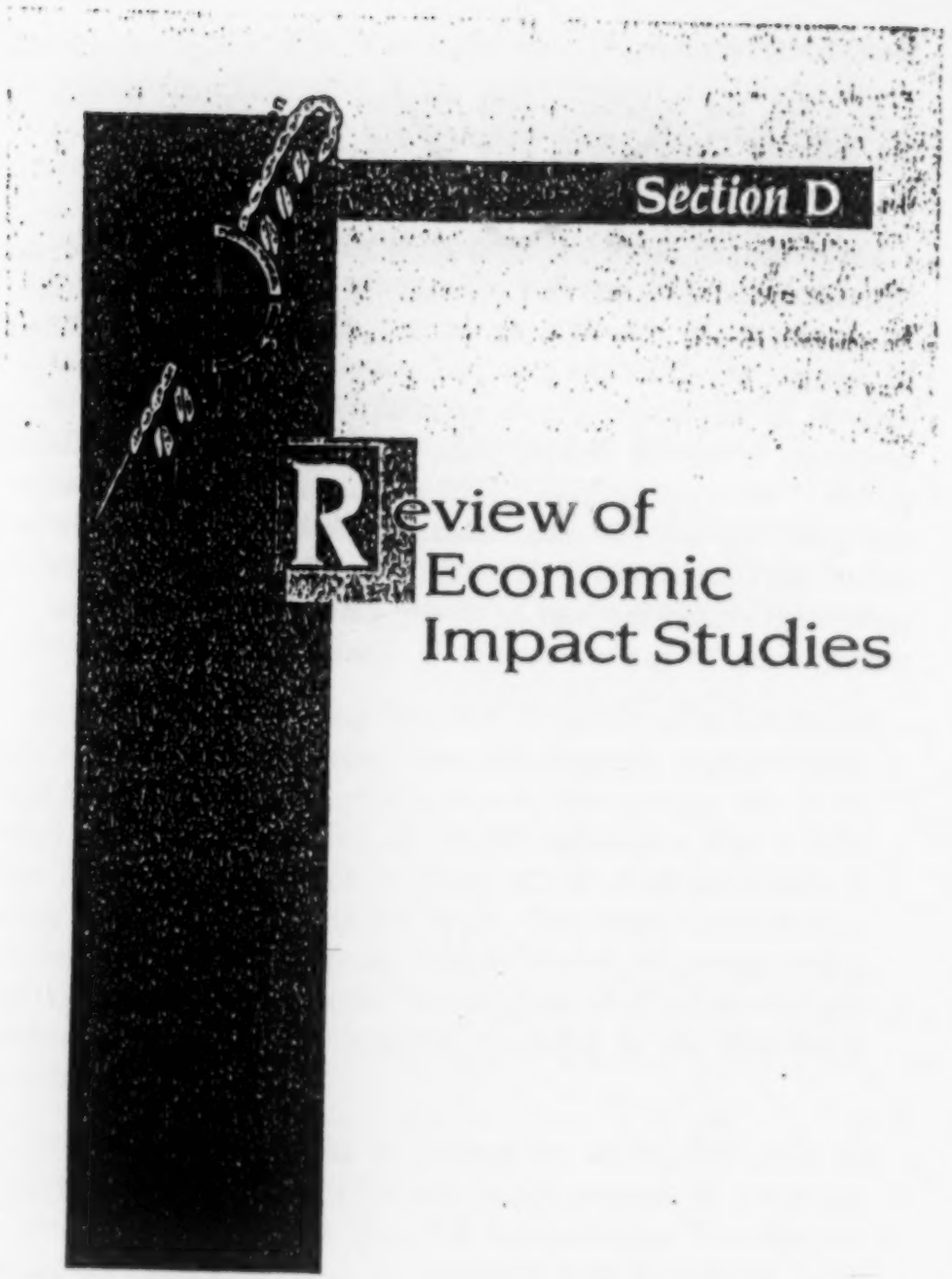
States have been using the 11th amendment as a defense when tribes file suit against them for allegedly negotiating in bad faith. The 11th amendment says that a state cannot be sued by individuals based on federal legislation, that a state has immunity from such lawsuits unless congress makes it clear that immunity does not apply. One response according to Jerry Strauss, an attorney representative for several tribes is "Congress has the power to abrogate state immunity and nobody disputes that Congress intended to do that when writing IGRA."

When the tribe seeks an appeal by taking the state to court the state dismisses the suit on the grounds of sovereign immunity as defined in the 11th amendment. The amendment bars suit by individuals against a state to enforce rights conferred by federal legislation, in the absence of clear congressional intent to authorize such suits.

Recent Agreements

In 1993, the Mashantucket Pequots tribe agreed to pay the state of Connecticut 25% of slot machine revenue in return for a monopoly on slots.

On April 25, 1994 Governor Weicker Jr. settled the Mohegan's land claims in exchange for permission to operate a casino. In this new agreement, the Pequots and the Mohegans will share the gaming business. The new compact extends to all casino games in return for $160 million in payments from the tribes. This agreement could be dissolved if the legislature legalizes not just slot machines, but any gambling off the reservation. If the agreement is dissolved the state would be forfeiting the tribes' millions. This agreement raised the barrier to any gaming company other than Indians to operate casinos in Connecticut.



REVIEW OF ECONOMIC IMPACT STUDIES

Introduction

There have been several studies which show the positive effects of Indian Gaming on reservations and the economy. The Indian Casinos stimulate economic growth due to direct and indirect impacts. For example, direct impacts are the wages paid to employees as well as the purchases from suppliers. For purposes of illustration, let us review the economic impact of the wages paid to employees of the casino. The casino employees have the means to consume and they will therefore spend a portion of their payroll on goods and services both on and off the reservation. The producers of these goods now have extra incomes and they will in turn spend a portion of their income. This process will continue. Thus an endless chain of secondary consumption and respending is set in motion by the primary investment (in this example the casino employees' wages.) This is what is referred to as the multiplier effect. Spending stimulates additional or induced spending in addition to employment. There are other positive economic effects such as decrease in unemployment and public assistance expenditures.

Although different methodologies have been used there are a number of common findings which are revealed in a majority of the studies:

- Increases in tribal revenues to support Indian government services, economic development, and self-sufficiency
- Increases in employment (Indian and non-Indian)
- Reduction in public assistance expenditures
- Creation of induced spending and induced employment
- Increases in the number of out-of-state visitors which stimulates visitor spending
- Increases in tax revenues

- Decrease in crime rates.

These studies also prove that the Gaming operations not only benefit the Indian community but the surrounding regions as well. As will be explained in several of the studies, more often than not the casinos employ a higher percentage of Non-Indian employees. An estimated 78% of casino gaming employees are non-Indians.

The following studies have been reviewed and the key findings will be highlighted in this report:

- The Economic Impact of Sycuan Gaming Center on East San Diego County — prepared by McGladrey & Pullen CPA's and Consultants
- Economic Benefits of Tribal Gaming in Minnesota — prepared by KPMG Peat Marwick
- The Economic and Fiscal Impact of American Indian Gaming on the Government of the State of Wisconsin — prepared by James Murray, Ph.D.
- The Economic and Fiscal Impact of Indian Reservation Gaming in New Mexico — prepared by Center for Applied Research
- The Economic and Social Effects of Indian-Owned Gaming Enterprises in Michigan — prepared by University Associates
- The Economic Impacts of Foxwoods High Stakes Bingo & Casino on New London County and surrounding areas — prepared by Arthur Wright and Associates

Key Findings

The Economic Impact of the Sycuan Gaming Center on East San Diego County

Although there has been a recession in San Diego County, the Sycuan Gaming Center has experienced tre-

mendous growth. It has impacted the local economy by creating more than 2,100 jobs in 1993 and generated total spending of nearly $70 Million.

The population of the Sycuan is only 100 people. The tribe has operated a gaming operation since 1983 starting with bingo, then adding card games, OTB and video pull tab machines. In 1990 a 67,000 square foot Las Vegas style casino was built for $3.5 million and then expanded in 1992 for $500 thousand.

There have been positive benefits to the tribe such as no reliance on public assistance for the last six years. The tribe has improved the infrastructure and also invested in non-gaming related ventures to gain long-term economic self-sufficiency. Proceeds from the gaming center have funded the following tribal operations:

- Medical and dental clinic for tribal members and all employees including Non-Indians
- Pharmacy
- Day Care Center
- Chapel
- Ambulance Service
- Library
- Police department
- Fire Department
- Automotive Shop
- Human Resources department
- Tribal administrative offices

Gaming revenues have continued to increase significantly. Gaming revenues include revenues from bingo, pull tabs, card games, off-track betting, and restaurant and concessions. In 1990, the expansion of the facility allowed for the inclusion of card games, which is the largest source of

gaming revenues (53.3% of total revenues). Total gaming revenues increased 28% from $34.0 million in 1992 to an estimated $43.6 million in 1993.

The largest expenditures for the gaming operation are operating expenses which totaled $22.1 million in 1993 and the payroll and payroll taxes which totaled $9.7 million in 1993. Other capital expenditures related to the gaming center totaled $2.2 million. Total expenditures in 1993 were $34.0 million.

The revenues less the total expenditures totaled $5.4 million in 1992 and $9.6 million in 1993. These amounts are referred to as "Proceeds" and IGRA requires that proceeds be used for the general welfare of tribal members, promoting economic development, funding tribal government and local charitable donations.

The following table summarizes the tribes use of proceeds:

Use of Proceeds	1992	1993
Tribal Government	$ 651,000	$1,089,000
Education and Human Services	3,048,000	3,153,000
Per Capita and Direct Services	804,000	930,000
Capital expenses and investments	929,000	4,428,000
Total	$5,432,000	$9,600,000

According to the San Diego Business Journal, the Sycuan Band is the second largest employer in East San Diego County with 851 employees in 1993. It is interesting to note that 90% of those employed by the Gaming Center and tribal operation are non-Indian.

The economic impact from the Sycuan Gaming Center and Tribal Operations was $38.6 million for direct expenditures and $31.3 million for induced expenditures resulting in a total economic impact of $69.9 million.

Economic Benefits of Tribal Gaming in Minnesota

The state of Minnesota entered into video games of chance compacts with 11 tribes between October 20, 1989 and the spring of 1991. The state also entered into blackjack compacts with 11 tribes between May and August of 1991.

Tribal gaming has resulted in an estimated total of 37,575 jobs from both direct and induced employment. Of this total 9,975 persons are employed directly by the tribal gaming facility. Indians and non-Indians benefit from the gaming facility. Indians hold 27% of the jobs and non-Indians hold 73% of the new jobs. The tribal gaming employment was compared to other employers and it ranked as one of the largest employers in Minnesota. According to a study conducted by the Minnesota Planning Agency 20,000 indirect employment jobs are being supported by tribal gaming and 7,600 could be supported by tourism expenditures.

The state has also reduced Public Assistance spending. The number of Aid to Families with Dependent Children (AFDC) recipients has decreased by 14% between 1987 and 1992 in 8 non-urban counties with tribal gaming whereas the statewide number of recipients increased 17% for the same period.

Gaming revenues increased 173% from 1991 to 1992 totaling $390 million. Video games comprised the largest share (74.7%) of total revenues.

The largest expenditures were payroll totaling $116.9 million and operations-related totaling $106 million. The revenue less the operating expenses yielded available proceeds of $167 million. In accordance with IGRA the tribe utilized proceeds as summarized below.

Use of Proceeds	1992
Direct services	$39.5 million
Human services and education	4 million
Charitable contributions	.8 million
General Gov. and trusts	13.4 million
Management fees	8.3 million
Capital expenditure enterprise	32 million
Capital expenditure infrastructure	6.5 million
Housing	17.3 million
Investments and unallocated	45.2 million
Total	$167 million

The Economic Impact of American Indian Gaming on the Government of the State of Wisconsin

There are currently 15 Class III gaming facilities owned by American Indian tribes in the State of Wisconsin. This study released in 1993 showed the dramatic benefits that Indian Gaming has had on the state of Wisconsin. The benefits to the state of Wisconsin from welfare savings, gas taxes, income taxes and sales taxes were estimated at $51.7 million. These savings are summarized as follows:

Savings	1992
Welfare Savings	$2.2 million
Gas Taxes	$14.2 million
Sales Taxes	$17.3 million
Income Taxes	$18 million
Total	$51.7 million

These estimates were derived by reviewing current employment data and historical welfare and unemployment statistics. An estimated 30,000 jobs are directly or indirectly supported by Indian Gaming Facilities. Of this total, 4,500 persons were employed directly by the gaming facility. Approximately, 5,500 jobs were created in construction, supplier firms, and from non-gaming visitor spending. The remaining 20,000 jobs were indirectly supported by the gaming facilities. The estimated tax liability as highlighted above is $18 million.

The study also reviewed the reduction in welfare benefit costs resulting from the employment of former welfare recipients by the gaming facilities. A survey of employees of the American Indian gaming facilities revealed that 820 of those employed in 1992 had been welfare recipients prior to joining the operation. Using the average payments it was estimated that a total of $1.6 million in payments was saved by the state and approximately $1.4 million was saved by the federal government.

There were also approximately 205 Indians receiving Relief for Needy Indian Person (RNIP) benefits prior to joining the gaming operation. The average RNIP benefit in 1992 was $2,676 resulting in a total savings of $548,580 in this program because of direct gaming employment.

As stated in the table above, there was also significant tax revenue generated from sales associated with the operation of the gaming facility. Total sales tax and gas tax collections from sales associated with facility exceeded $32 million in 1992.

This study also reviewed crime rates and found that crime rates were actually lower in those communities with gaming facilities. The total number of offenses in rural counties increased by approximately 11 percent, the increase in casino counties was less than 5% while the increase in non-

casino rural counties was over 12%. These statistics do not support the contention that costs are being incurred in casino counties due to higher crime rates associated with Indian gaming facilities. Moreover, this does not reflect the thousands of enforcement hours provided at no federal or state costs by the tribally funded officers and departments.

The Economic and Fiscal Impact of Indian Reservation Gaming in New Mexico

This study reviewed the operations of 10 tribes which comprise all Indian gaming enterprises in New Mexico.

The study focused on three dimensions to determine the economic impact of gaming.

- The wage and salary income of employees at all reservation gaming enterprises was identified. A portion (60%) of the wage and salary income of gaming operation employee was assumed to be expended in the state economy.
- The value of expenditures that are made by tribal gaming operations for supplies, utilities, equipment, etc. was identified.
- The tourism expenditures related to gaming were also determined. The tourism expenditure patterns were primarily based on the All Indian Pueblo Council Report, "The Economic and Fiscal Impact of American Indian Reservations in New Mexico." (October 10, 1993)

The principal source of data was a tribe by tribe survey which described number of jobs, salary payments, etc. Economic and taxation assumptions were taken from economic models developed for the All Indian Pueblo Council by the Center for Applied Research.

Economic Impact attributed to Indian Gaming Operation Employees

The Indian Reservation gaming operation directly supports 597 jobs and accounts for induced employment of 176 job holders state wide. This results in a total salary and wage income impact of $6.9 million.

Economic Impacts attributed to Tribal Government Expenditures

The expenditures for gaming operations supplies, goods and services created 879 jobs state-wide and $20.1 million in wage and salary income.

Economic Impacts of tourism attributed to Indian Reservation Gaming

The tourist expenditures account of 3,332 jobs and $65.6 million salary and wage income statewide.

The following table summarizes the economic impacts discussed above:

Basis of Impact	Amount
Total Income - Gaming Operation Employees	$ 6,935,509
Total Income - Expenditures for Operations	$20,149,451
Total Income - Tourism Expenditures	$38,530,608
Total	$65,615,568

Fiscal Impacts of Indian Gaming

The key assumption forming the basis for tribal government expenditures is that gaming enterprises obtain at least 90% of the goods, services and supplies for their operations in state. The gaming operations are directly and indirectly contributing $1.4 million in tax revenue.

The Economic Impact of Michigan's Indian Gaming Enterprises

This study compiled information from all seven Michigan tribes. There are eight separate gaming enterprises which include casino and bingo operations. Some of the tribes operate businesses to serve customers including restaurants, hotels, and gift shops.

In August 1993, a total of 2,681 people were employed by Michigan gaming facilities. Of these 52% were Native Americans and 48% were non-Indians. Of those employed 49% were welfare recipients and 44% were unemployed prior to joining the gaming facility operations. All of the facilities rank among the top eight employers in their respective counties. Employment of tribal members has substantially increased. On average, tribal unemployment rates decreased 77% as a result of the availability of on reservation employment.

The economic benefits were quite significant. The eight tribes paid a total of $5.7 million in state and federal taxes. The seven tribes reported total revenues of $70.7 million. Gaming payrolls totaled $19.7 million in 1992. The gaming enterprises spent a total of $14.5 million on goods and services.

These facilities continue to flourish as evidenced by the growth from 1992 to 1993 in several key areas. The number of employees has increased by 40%, taxes paid increased by 5%, total receipts increased by 70%, payroll increased by 46% and expenditures on goods and services increased by 84%.

The Economic Impacts of the Foxwoods High Stakes Bingo and Casino on New London County and Surrounding Areas

This study focused on 3 economic impacts of the Foxwoods High Stakes Bingo and Casino, Employment and earnings, AFDC impact, and Real value of housing.

I. Employment and earnings summary

The Foxwoods High Stakes Bingo and Casino, owned by the Mashantucket Pequot Tribe, opened in early 1992. This opening created 6,000 new jobs and is expected to increase to 9,500 in 1994. The average gross pay of casino employees is approximately $25,000 a year plus $9,300 for fringe benefits. The salaries for casino employees are on average, $2,100 more than average New London County salaries before February 1992. Due to increased economic activity, new indirect (non-casino) jobs will also be created. Applying economic impact analysis, the study showed that each new Foxwoods job, supported 1,107 additional non-casino jobs in New London County. Therefore, the combined effect of the 9,500 jobs is a total of 20,017 new jobs. The total associated payroll is estimated to be $478.5 million per year. This analysis also determined that each new Foxwoods job, supported 0.74 additional non-casino jobs in the rest of Connecticut. This translates into more than 7,000 new jobs, with an annual payroll of more than $214 million. Overall, employment created by the opening of the Foxwoods High Stakes Bingo and Casino have a significant correlation to creating jobs in all of Connecticut.

II. AFDC Impact

Using economic methods, this study determined that each new job trims 0.154-0.26 recipients from AFDC (Aid for Dependent Children) rolls. The correlation was also determined that when the economy is more robust, these figures increase. When the economy is more depressed, these figures tend to drop.

To estimate the total savings from the drop in recipients who receive AFDC, it was assumed that a conservative AFDC payment is $200 per month and 26,000 direct and indirect jobs will be created. The total estimated savings would range from $9.61 million to $16.20 million, based on

an estimated reduction in AFDC recipients of 4,004-6,700 people.

III. Real Value of Housing:

Also applying econometric analysis, estimated that over the long run, every 1 percentage point reduction in unemployment rate in the four eastern most Labor Market Areas (LMA's) in Connecticut will increase better than 7.7 percent in real housing prices in the 4 LMA's. Converting casino-related employment projections into decline in unemployment rates, it is estimated that real housing prices in the 4 LMA's will increase by $1.177 billion by late 1994. In addition, including the effects of non-casino related employment, the total increase in real housing prices is estimated to be $6.1 billions by the end of this decade.

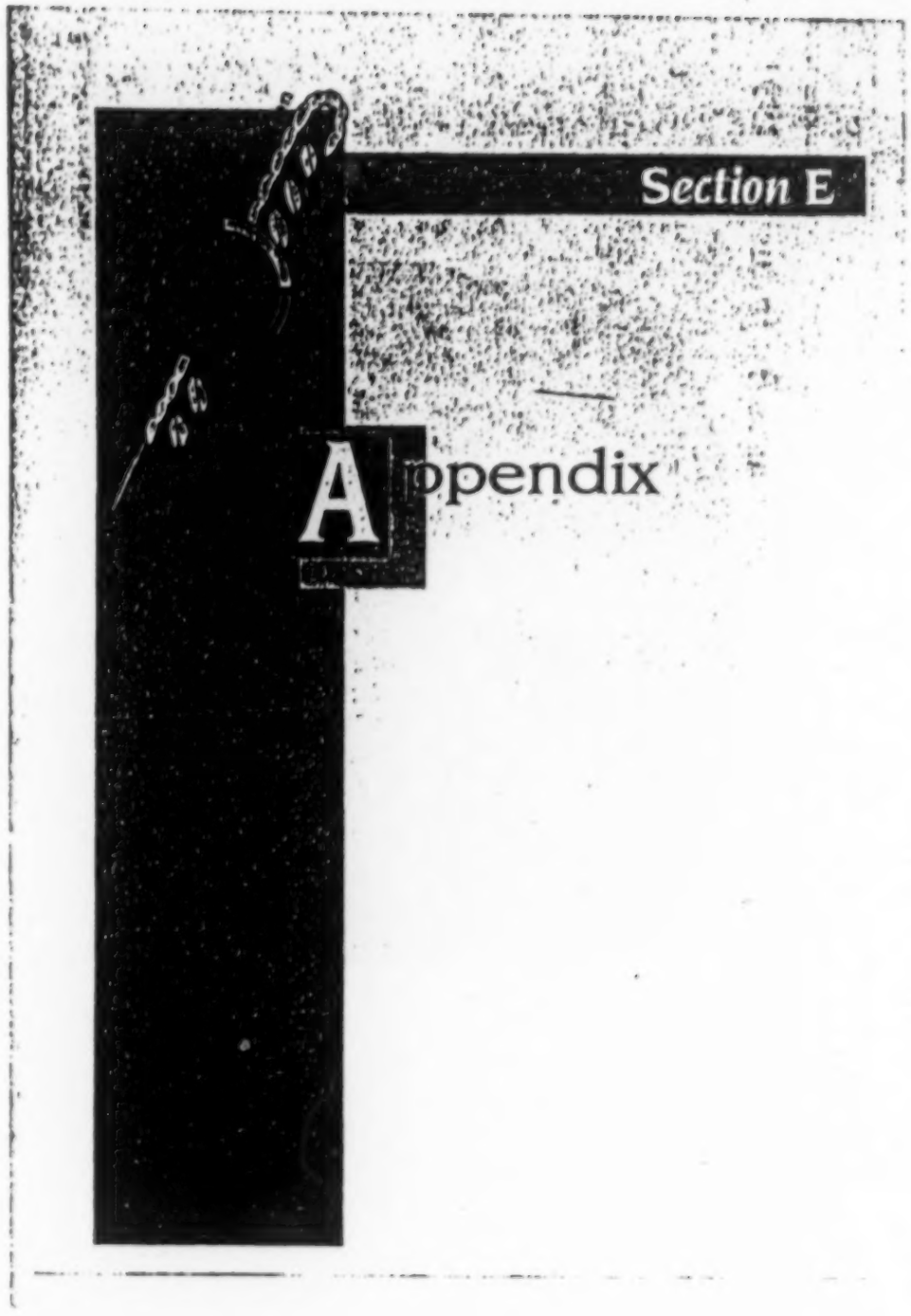
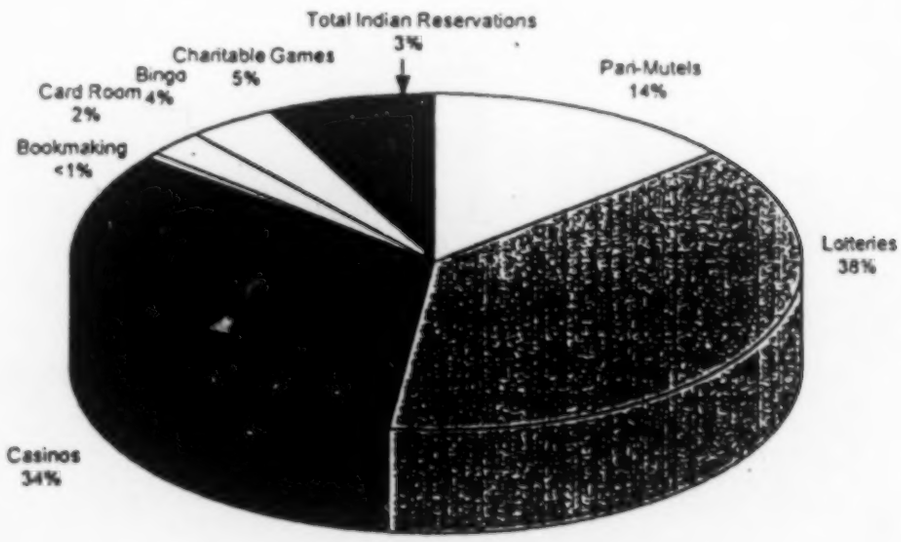


EXHIBIT A

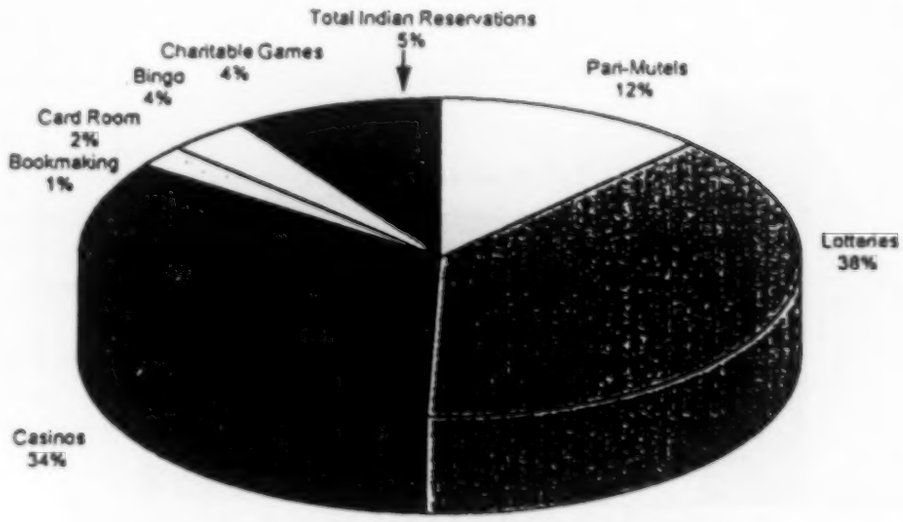
Total US Gaming Revenues Percentages By Industry - 1991



Source: Gaming and Wagering Business, 1993

EXHIBIT B

Total US Gaming Revenues Percentages By Industry - 1992



Source: Gaming and Wagering Business, 1993

EXHIBIT C

Indian Gaming
Trend in Total Revenues 1985-1992

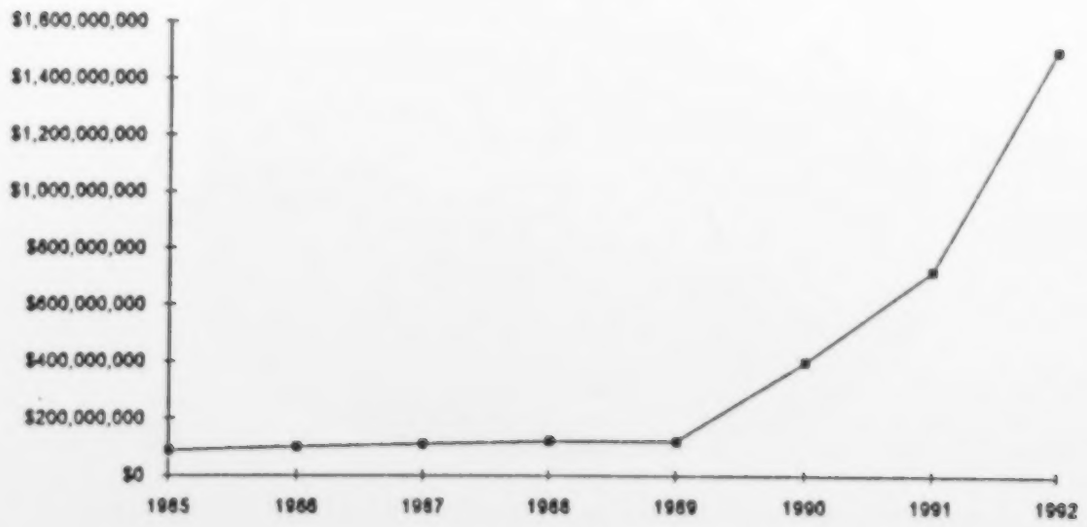
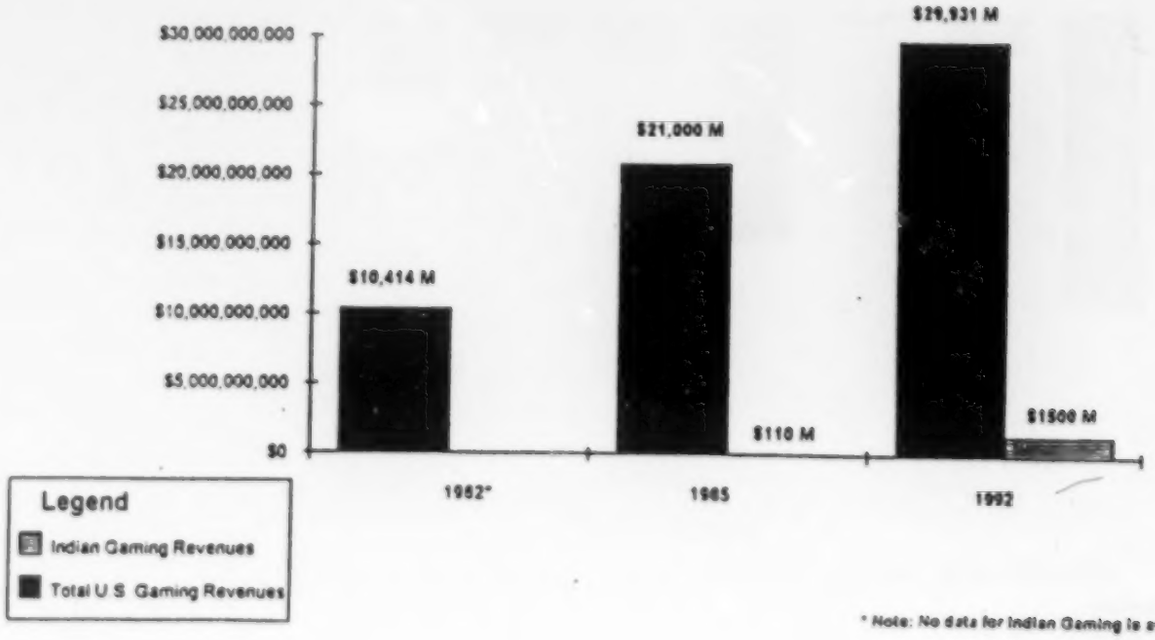


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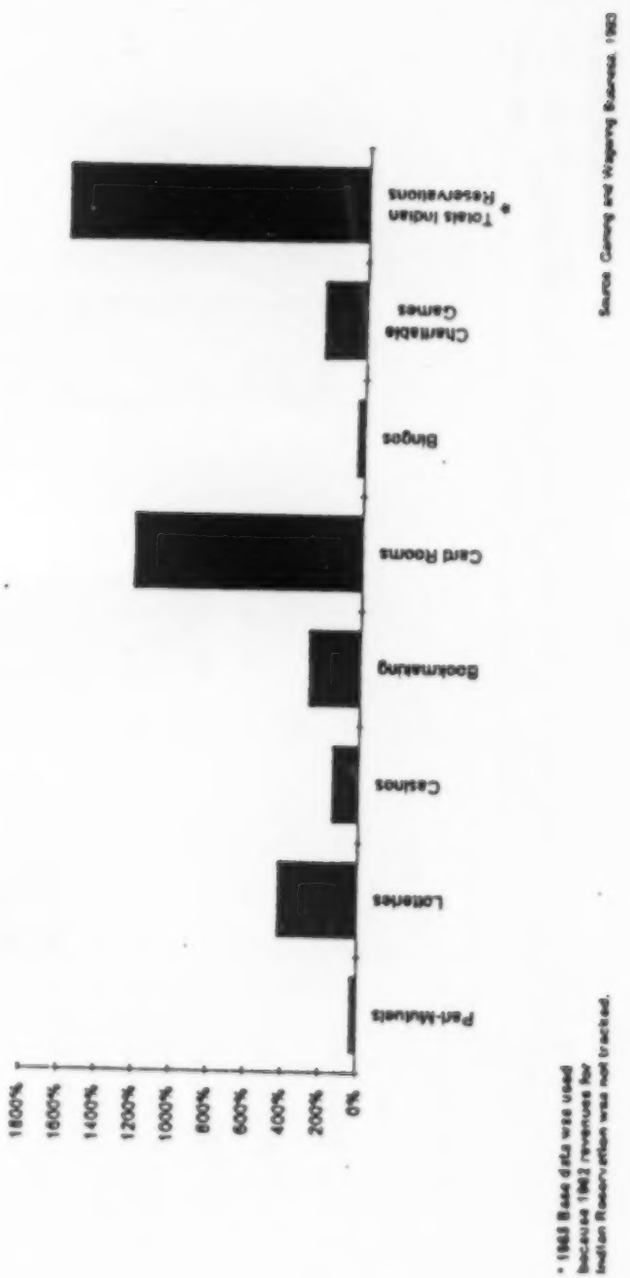
Total US Gaming vs. Indian Gaming Revenues
1982, 1985 and 1992



* Note: No data for Indian Gaming is available for 1982

EXHIBIT E

Percent Change of U.S Gaming Total Revenues 1982-1992



Source: Gaming and Wagering Business, 1993

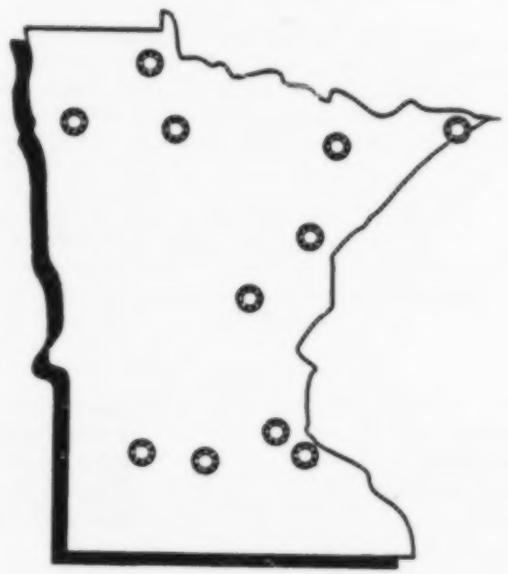
* 1983 Base data was used because 1982 revenues for Indian Reservation was not tracked.

Appendix 4

MIGA

Minnesota Indian Gaming Association

Economic Benefits of Tribal Gaming in Minnesota 1992



MIGA

Minnesota Indian Gaming Association

Economic Benefits of Tribal Gaming in Minnesota 1992

Contacts

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MIGA

Minnesota Indian Gaming Association

April 30, 1993

The Minnesota Indian Gaming Association (MIGA) is pleased to present this second authorized study of the economic benefits of Tribal gaming in Minnesota. The federal Indian Gaming Regulatory Act of 1988 provided a statutory foundation for Tribal gaming "as a means of promoting economic development, self-sufficiency and strong Tribal government." This study was undertaken to assess the continuing economic impact of Tribal gaming in Minnesota. Authorized by MIGA, the study presents data gathered from nine of the eleven Minnesota Indian Tribes operating gaming casinos. The data identify economic benefits from Tribal gaming in the areas of :

- Increased Tribal revenues to support Indian government services, economic development and self-sufficiency;
- Increased jobs and employment;
- Reduced public assistance expenditures;
- Increased jobs from secondary spending and construction; and
- Increased out-of-state visitor spending in Minnesota.

The study concludes that Tribal gaming in Minnesota is well on its way to becoming one of the state's largest employers. As this industry continues to develop, other benefits associated with economic progress will be studied. Visible progress is already occurring on Minnesota's Indian reservations in community development, education, health care, nutrition, housing and infrastructure improvements. This study confirms that non-Indian sectors of Minnesota's economy are enjoying sufficient benefits as well.

Tribal gaming occupies a unique niche in the fabric of our society. Unlike other industries, it is operated by sovereign governments to finance programs and services for its citizens, to build economic self-sufficiency on Indian reservations, and to create economic opportunity for Indians and non-Indians alike. In this context, it is clear that Tribal gaming in Minnesota is achieving the objectives set forth by the U.S. Congress.

Sincerely,

Myron Ellis,
Chairman, MIGA

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EXECUTIVE SUMMARY

Study Participants

The Minnesota Indian Gaming Association (MIGA) has authorized a study of the economic benefits of Tribal gaming in Minnesota. A professional service firm, KPMG Peat Marwick, provided the technical support and analysis to conduct the study. The following nine MIGA members participated in the study:

- Bois Forte Chippewa
- Fond du Lac Chippewa
- Grand Portage Chippewa
- Leech Lake Chippewa
- Lower Sioux
- Mille Lacs Chippewa
- Prairie Island Sioux
- Shakopee Sioux
- Upper Sioux

Fiscal years are not the same for each Tribe. Some use June 30 and others use September 30 or December 31 as the end of the fiscal reporting period.

Results from the study identified several significant economic benefits.

Gaming Proceeds

During fiscal years 1991 and 1992, the gaming operations of the nine study participants produced the following financial results:

	1992	1991
Revenues after payouts	$390 million	143 million
Less expenditures	223 million	89 million
Available proceeds	$167 million	54 million

The gaming expenditures are benefiting employees and a variety of suppliers and service providers. The proceeds from gaming are being used for purposes consistent with the

National Indian Gaming Regulatory Act of 1988 to:

- Fund tribal government;
- Provide for the general welfare of the Tribe;
- Promote economic development;
- Contribute to charity; and
- Help fund local agency operations.

Proceeds are being used for direct human services, education, housing and infrastructure improvements as well as for investment in the Tribal business enterprises.

Job Creation and Employment

Tribal gaming has resulted in 9,975 new jobs in Minnesota for persons working directly for the Tribal gaming enterprises. Indians hold approximately 27% of the new jobs and non-Indians have benefited from 73% of the new jobs. A majority of the jobs have been created in the non-urban areas of the state where steady jobs on an annual basis are in short supply.

If these jobs were attributed to a single employer, Tribal gaming would be one of the 10 largest employers in Minnesota.

Public Assistance Savings

An analysis of gaming operations in non-urban counties shows a strong correlation between an increase in jobs in the non-urban counties with Tribal gaming facilities and a decrease in AFDC recipients. The number of AFDC recipients decreased by 14% between 1987 and 1992 in the eight non-urban counties with Tribal gaming facilities while the state-wide number of recipients increased 17% for the same period. This produces a benefit to the state in the form of reduced spending for public assistance.

Indirect Employment

A study prepared by the Minnesota Planning Agency estimates an additional 20,000 indirect employment jobs are being supported by Tribal gaming.

Out-of-State Visitor Spending

It is estimated by the Minnesota Planning Agency that out-of-state visitors spent $245 million on various travel related goods and services in fiscal year 1992. This level of spending could support an estimated 7,600 jobs.

Job Summary

The following is a summary of the total number of jobs that could be supported by Tribal gaming based on the methodology used in the study.

Source of jobs	1992	1991
Direct	9,975	4,730
Indirect estimate	20,000	5,300
Visitor spending estimate	7,600	600
Total	37,575	10,630

Other Benefits

There are likely additional benefits from Tribal gaming that have not been quantified due to a lack of data including:

- Increased payroll tax revenues;
- Increased unemployment insurance revenues;
- increased sales tax revenue from visitor spending;
- Increased sales tax revenue from induced spending;
- Improved housing;
- Improved health care;
- Increased job skills; and
- Improved self-esteem from being employed.

STUDY BACKGROUND AND APPROACH

Background

The Minnesota Indian Gaming Association (MIGA) is an organization that includes members from each of the eleven Tribes in Minnesota. These communities are federally recognized Tribes and each has an independent tribal government.

MIGA has authorized a second study of the economic benefits of Tribal gaming in Minnesota. The professional service firm of KPMG Peat Marwick was engaged by the members to provide technical assistance and analysis with respect to the study elements. Exhibit 1 is a listing of the Indian Tribes and gaming facilities that participated in the study. Since some Tribes and gaming facilities did not participate, the aggregate data included in the study is less than the total Tribal gaming picture in Minnesota.

Exhibit 1

PARTICIPATING MEMBERS

Tribe	Gaming Facility
Bois Forte	Fortune Bay
Fond du Lac	Fond du Luth and Big Bucks
Grand Portage	Grand Portage Casino
Leech Lake	Northern Lights and Palace Bingo
Lower Sioux	Jackpot Junction
Mille Lacs Chippewa	Grand Casino Mille Lacs and Hinckley
Prairie Island Sioux	Treasure Island
Shakopee Sioux	Little Six and Mystic Lake
Upper Sioux	Firefly Creek

Approach

Data was based on the 1992 fiscal year. Data collection forms were developed and included the following elements:

- Revenue — Revenue data for each gaming facility was obtained directly from the facility. The term revenue in casino operations is generally defined as the win from gaming activities, that is, the difference between gaming wins and losses, not the total amount wagered. All reference to revenue in this study is after payouts and does not include the total amount wagered.
- Source of Revenue — Revenue data has been classified by major source. The major classifications of Tribal gaming revenue in this study include:
  - — Video games,
  - — Blackjack,
  - — Bingo and pull tabs, and
  - — Concessions and other.
- Operating Expenditures — Expenditure data was obtained from each gaming facility and classified into the following categories:
  - — Salaries and wages,
  - — Payroll taxes and benefits,
  - — Advertising/promotion,
  - — Utilities, and
  - — All other operating expenditures.
- Use of Proceeds — Information was obtained on the use of proceeds made available from gaming activities. The major classifications for use of proceeds include:
  - — Direct services and per capita payments to members,
  - — Human services and education,
  - — Charitable contributions,
  - — Investments,

— Management fees,
— Other tribal government trusts,
— Enterprise facilities,
— Public infrastructure, and
— Housing.

Other areas of economic analysis included the following:

- Employment Trends — Data was obtained on the number of jobs created by Tribal gaming including the direct jobs at the gaming facilities and the indirect jobs resulting from gaming expenditures.
- Public Assistance Trends — Data was obtained on the numbers of persons receiving public assistance in Minnesota to analyze any changes that might be related to the growth in gaming employment.

Sources of Data

Tribal gaming is a relatively new business activity in Minnesota and data sources are in a developmental stage. Fiscal data related to gaming operations was obtained from internal reports prepared by the accounting and administrative staffs of the participating MIGA members. The staff personnel have attempted to answer all inquiries essential to conducting the study and have made reasonable efforts to present accurate data. The fiscal data was not independently verified to other documents. It is possible that the data presented includes inconsistencies in classification or other discrepancies because each facility has developed its own methods of reporting. Other sources of data are referenced where appropriate.

GAMING OPERATIONS: FISCAL DATA

Status of Tribal Gaming in Minnesota

The status of Tribal gaming in Minnesota has been documented in a report to the legislature submitted by the offices of the Governor and Attorney General and the Tribal State Compact Negotiating Committee, dated September 5, 1991. The following is a summary of items related to Tribal gaming operations in Minnesota:

- Indian Gaming Regulatory Act (IGRA) — Signed into law on October 17, 1988. The Act provides the regulatory framework for various forms of gambling on Tribal lands. A primary purpose of the Act is to provide a statutory foundation for Tribal gambling operations as a means of promoting economic development, self sufficiency and strong Tribal government.
- Video Games of Chance Compacts — between October 20, 1989 and the spring of 1991, the State of Minnesota entered into video compacts with the eleven Tribal governments in the state.
- Blackjack Compacts — between May and August of 1991, the State of Minnesota entered into blackjack compacts with the eleven Tribal governments in the State.

The actions of Congress and the State of Minnesota have established the regulatory framework for Tribal gaming. The Tribal governments have established gaming ordinances, built facilities and initiated operations pursuant to the evolving regulatory framework.

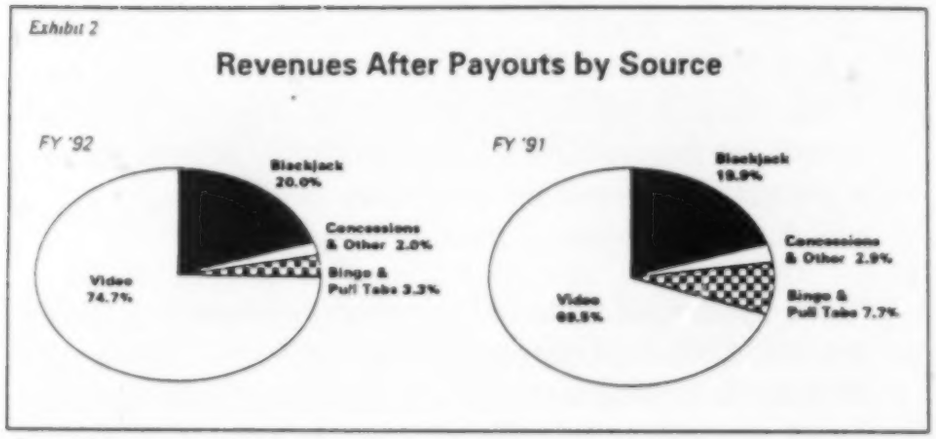
Gaming Operations–Revenues

Fiscal data was obtained from reports furnished by the study participants. Revenues reported are net of payouts. The following is a summary of revenues by major source in millions of dollars .

Revenue source	1992	1991
Video	$ 291.5	99.3
Blackjack	77.9	28.5
Bingo and pull-tabs	12.8	11.0
Concessions & other	7.8	4.2
Total	$ 390.0	143.0

Exhibit 2 illustrates revenue information by percent.

Exhibit 2



Source: Fiscal reports of study participants

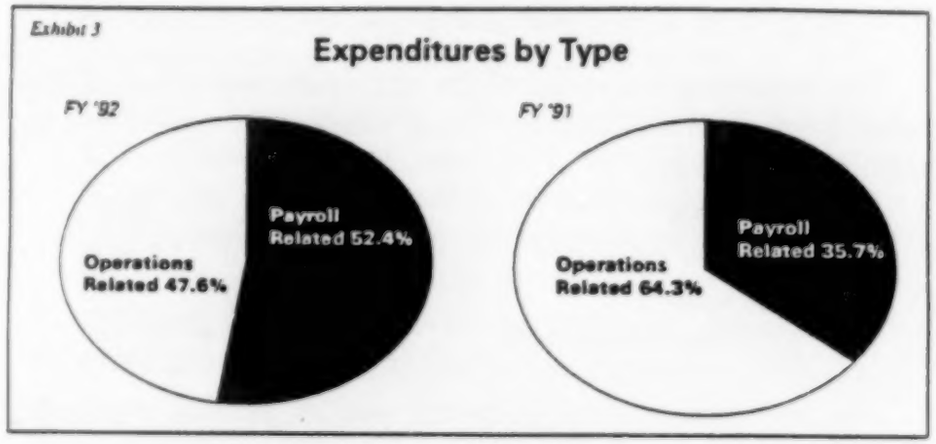
Gaming Operations–Expenditures

Fiscal data was obtained from reports furnished by the study participants. Expenditures were classified by major expenditure type. The following is a summary of expenditures by type in millions of dollars.

Expenditure type	1992	1991
Payroll-related total	$ 116.9	31.8
Operations-related total	106.1	57.2
Total	$ 223.0	89.0

Exhibit 3 illustrates expenditure information by percent.

Exhibit 3



Source: Fiscal reports of study participants

The category of operating expenditures includes various expenditures associated with the gaming operations such as advertising, utilities, training, security (if contracted), uniforms, supplies, maintenance, installation of equipment, business services and costs related to the use of facilities.

Gaming Operations — Use of Proceeds

The Indian Gaming Regulatory Act requires Tribal governments to adopt an ordinance governing the conduct of any gaming activity. The ordinance must prohibit the use of net revenues from any gaming for purposes other than to:

- Fund Tribal government;
- Provide for the general welfare of the Tribe and its members;
- Promote Tribal economic development;
- Donate to charity; and
- Help fund local government agency operations.

The following is a recap of the aggregate operations of the nine gaming operations for fiscal years 1991 and 1992 in millions of dollars:

Available proceeds	1992	1991
Revenue after payouts	$390.0	$143.0
Less expenditures	223.0	89.0
Available proceeds	$167.0	$ 54.0

For purposes of this study the use of gaming proceeds have been summarized as follows in millions of dollars.

Use of proceeds	1992	1991
Direct services	$ 39.5	$17.5
Human services and education	4.0	3.1
Charitable contributions	.8	—
General government and trusts	13.4	2.5
Management fees	8.3	3.6
Capital expenditure enterprise	32.0	27.3
Capital expenditure infrastructure	6.5	—
Housing	17.3	—
Investments and unallocated	45.2	—
Total	$167.0	$54.0

The following explanatory notes are provided to assist in understanding how gaming proceeds are being used by the Indian Tribes:

- Self Determination — The Indian Gaming Regulatory Act intended that Tribal governments be the primary beneficiary of gaming programs. Under broad guidelines established by the Act, Tribal governments have decision-making authority regarding this use of gaming proceeds.
- Aggregate Data — Data in the study has been aggregated. There are significant differences in the use of proceeds among the participating members.
- Capital Expenditures Enterprise — Approximately $27 million of fiscal year 1991 and $32.0 million of fiscal year 1992 proceeds have been expended for the construction, renovation or improvement of gaming facilities or is being held in short term investment accounts pending disbursement for construction projects recently completed or in progress.
- Per Capita Payments — The use of gaming proceeds is in large part driven by demographic factors. There are eleven Indian Tribes in the state of Minnesota: four Sioux and seven Chippewa. The Sioux communities have a much smaller population than the Chippewa communities (approximately 1,500 Sioux and 45,000 Chippewa by one 1991 estimate). The Sioux Tribes are much closer to population centers in the southern half of the state. The Sioux Tribes also have three of the larger gaming operations and are, therefore, in a better position to make per capita payments. The Chippewa Tribes have larger populations to provide for and smaller commercial markets. Therefore, the use of gaming proceeds in Chippewa Tribes is more likely to

be used to support general government and human services rather than per capita payments.

EMPLOYMENT TRENDS

Objective of Indian Gaming Regulatory Act (IGRA)

A primary objective of IGRA as stated in United States Public Law 100-497 is:

> *"to provide a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments."*

The trend in employment can be used to measure the accomplishments of economic development objectives.

Tribal gaming (primarily bingo and pull tabs) has been around for many years. High stakes bingo gained considerable publicity in 1982 when the Shakopee Mdewakanton Sioux opened the Little 6 Bingo Palace at Prior Lake (within the Twin City metropolitan area). Other Indian Tribes subsequently opened or expanded bingo operations in other parts of the state. During 1990, video slot machines were introduced in various operations and blackjack followed in 1991.

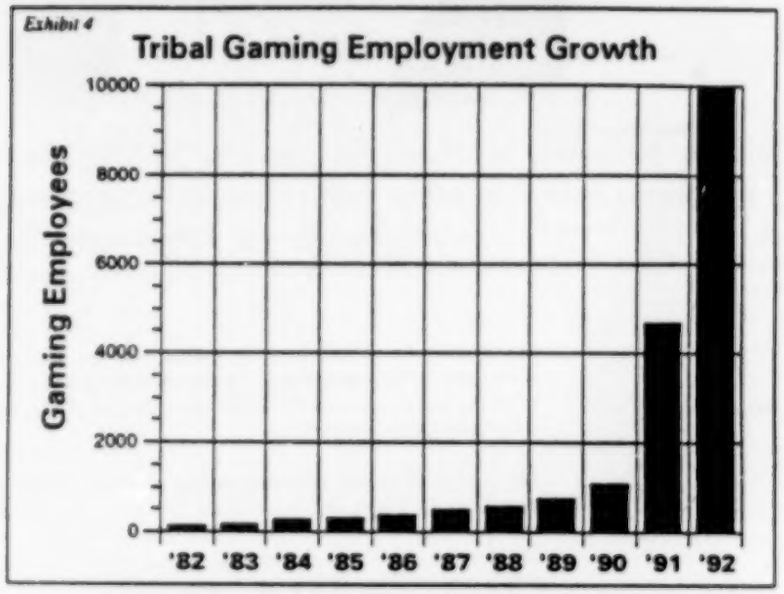
Tribal gaming operations and activities grew rapidly during 1991 and 1992 as newer facilities were opened.

Employment Trends

As the characteristics of gaming changed, the nature of the employment patterns changed. Bingo games were typically played in the evenings for a few hours. Some of the smaller operations did not have daily games. With the introduction of video slots and blackjack, the gaming audience changed, the gaming hours changed and the number of employees needed to staff the operations increased.

The number of persons employed by gaming operations was obtained from the study participants. Exhibit 4 illustrates the growth in employment from 1982 to 1992. As evident from the exhibit, the number of Tribal gaming jobs grew by over 4,000 during fiscal year 1991 and another 4,000 during fiscal year 1992.

Exhibit 4



The pay range for a majority of the jobs created is $5 to $10 per hour. While these wage rates are not impressively high, there are a number of beneficial attributes to the gaming jobs, including:

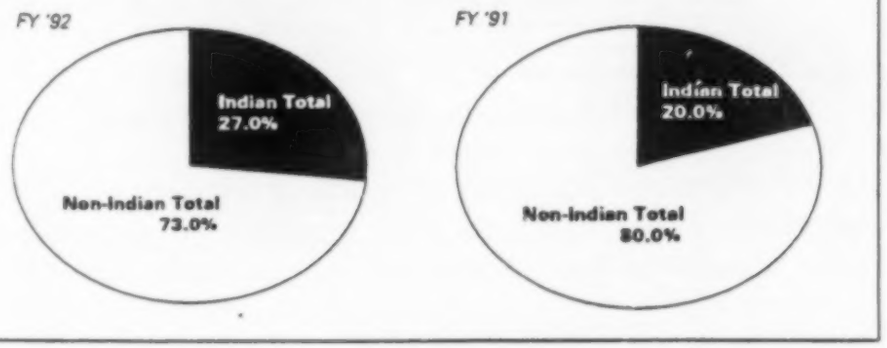
- Location of jobs in non-urban areas where more jobs are needed to balance the state economy;
- Location of jobs on or near Indian lands where unemployment has historically been excessive;
- Flexible hours allowing households to add incremental income without incurring substantial incremental cost for day care, transportation or clothing; and
- Opportunities to learn and develop basic job skills.

Indian and Non-Indian Job Distribution

An analysis of employment trends shows an interesting distribution between Indian and non-Indian employees. As shown in Exhibit 5, 20% of the gaming jobs were held by Indians in 1991 and 80% were held by non-Indians.

Exhibit 5

Overall Employment Ratio



The distribution of jobs between Indians and non-Indians is primarily attributable to demographics and location of the gaming facilities. There are more Indian job seekers in the northern part of the state where the gaming facilities are smaller.

The Bureau of Indian Affairs prepares periodic reports on the Indian population receiving services and the labor force estimates. The January, 1989, report estimates that 4,300 Indians living on or adjacent to reservations in Minnesota were not employed and were seeking work. Stated another way, 38% of the Indians between the ages of 16 and 64 were unemployed and seeking work.

During 1991 and 1992, the total number of jobs created by Tribal gaming could accommodate every unemployed Indian job seeker living on or adjacent to a reservation in Minnesota. Unfortunately, the jobs created were not all within a reasonable commute (25 miles) of the prospective Indian job seekers.

The gaming operations in the southern part of Minnesota are near the smaller populations of Indians. Of the study participants, five operations have the potential to virtually eliminate unemployment on the reservation. Tribal gaming is not the complete answer to Indian unemployment because:

- There will likely be demographic or geographic barriers to full employment; and
- There will likely be individuals who are unable to work in gaming facilities for a variety of reasons

The study participants are all aware of the need to use gaming proceeds to develop other areas of Tribal economies and create a variety of job opportunities.

Relative Size of Tribal Gaming Employment

The relative size of Tribal gaming employment was compared to the largest employers in Minnesota. Exhibit 6 lists the largest 25 employers. If Tribal gaming were a single corporation, the combined employment would rank in the top 10.

Exhibit 6

Employment Comparison to Minnesota's 25 Largest Employers

Rank	Company Name	Minnesota Employment
1	3M	23,000
2	Dayton Hudson Corporation	21,650
3	Northwest Airlines Inc.	17,500
4	Mayo Foundation	16,500
5	Health One Corp.	11,000
6	Honeywell Inc.	11,000
⊙	*Tribal Gaming 1992*	9,975
7	IBM Corporation	9,300
8	Lifespan Inc.	8,800
9	Norwest Corporation	8,151
10	Unisys Corporation	8,000
11	U.S. West	7,316
12	Fairview Hospital & Health Services	7,000
13	Northern States Power Company	7,000
14	First Bank System Inc.	6,426
15	Fingerhut Corporation	5,800
⊙	*Tribal Gaming 1991*	5,747
16	K mart Corporation	5,700
17	Health East Corp.	5,050
18	Control Data Corporation	4,864
19	J.C. Penney Company Inc.	4,800
20	Burlington Northern Railroad Inc.	4,500
21	United Parcel Service	4,200
22	The Prudential	4,100
23	Sears Roebuck and Company	4,033
24	Gateway/Rainbow Foods Inc.	4,000
25	Andersen Corporation	3,960

Source: Minnesota Department of Trade and Economic Development Report of Minnesota's Largest Corporate Employers, September 10, 1991

PUBLIC ASSISTANCE TRENDS

Job Creation and Public Assistance Relationships

A common economic development strategy is to develop industries and jobs in areas considered depressed. The rationale for this strategy is that creating a job in a depressed area will have a relatively greater benefit than creating a job in an economically progressed area. Depressed areas of a state or county will traditionally rely on and absorb comparatively more public assistance than a metropolitan area relative to their individual contribution to the state's economy.

The significance of the Tribal gaming industry in Minnesota is that a majority of the facilities, by virtue of being located on Indian reservations, are located in rural counties and distributed throughout the state. Consequently, the introduction of Tribal gaming has not only led to the creation of many jobs, but jobs which have a substantially greater economic benefit than would be the case in the urban areas.

Thus, when analyzing the benefits of the Tribal gaming industry, changes in demand for public assistance were considered.

Analysis Approach

Data pertaining to public assistance spending within the state was obtained from the State Department of Human Services. After considering the major public assistance programs, the Aid to Families with Dependent Children (AFDC) program was selected due to its significance in the overall public assistance environment. In the state of Minnesota, the AFDC program currently serves 63% of the Indians receiving public assistance, and 45% of all recipients receiving public assistance (making AFDC the largest sin-

gle human service program in the state in terms of recipient counts).

AFDC recipient counts is selected counties covering the period from 1987 to 1992 were analyzed. Because of the relative newness of Tribal gaming, identifiable trends would most likely be evident in that time period.

Only those non-urban counties with Tribal gaming facilities were considered. These parameters were used because, in such counties, the gaming facilities have emerged as one of the major employers. Any fluctuations in AFDC demands would more strongly correlate to the presence of Tribal gaming than it would in an urban area. A wider range and number of economic factors would influence a change in public assistance patterns in an urban area. Given the criteria, Cass County containing the Northern Lights and Palace Bingo facilities, Cook County containing Grand Portage Casino, Goodhue County containing the Treasure Island facility, Mahnomen County containing the Shooting Star Casino, Mille Lacs County containing the Grand Casino, Pine County containing the Grand Casino Hinckley, Redwood County containing the Jackpot Junction facility, and Roseau County containing the Lake of the Woods Casino were studied.

Recipient count trends in each selected county were then compared to the trends in the state as a whole and to the largest urban counties, Hennepin and Ramsey.

Recipient Trends

The results of this analysis suggest that the employment generated by the Tribal gaming industry is reducing the demand for AFDC services and expenditures, and is therefore fulfilling one of the main goals of the State/Tribal compact — economic development.

Exhibit 7 displays the number of AFDC recipients for Hennepin and Ramsey counties, the state of Minnesota, and the four non-urban counties containing major Tribal gaming operations.

Exhibit 7

AFDC RECIPIENT COUNTS

	1987	1991	% Increase (Decrease) from 1987	1992	% Increase (Decrease) from 1987
Hennepin	42,349	53,524	26%	54,665	29%
Ramsey	24,298	33,169	36%	35,280	45%
State of MN	156,932	181,021	15%	183,676	17%
8 non-urban counties with gaming*	6,002	5,255	(12%)	5,137	(14%)

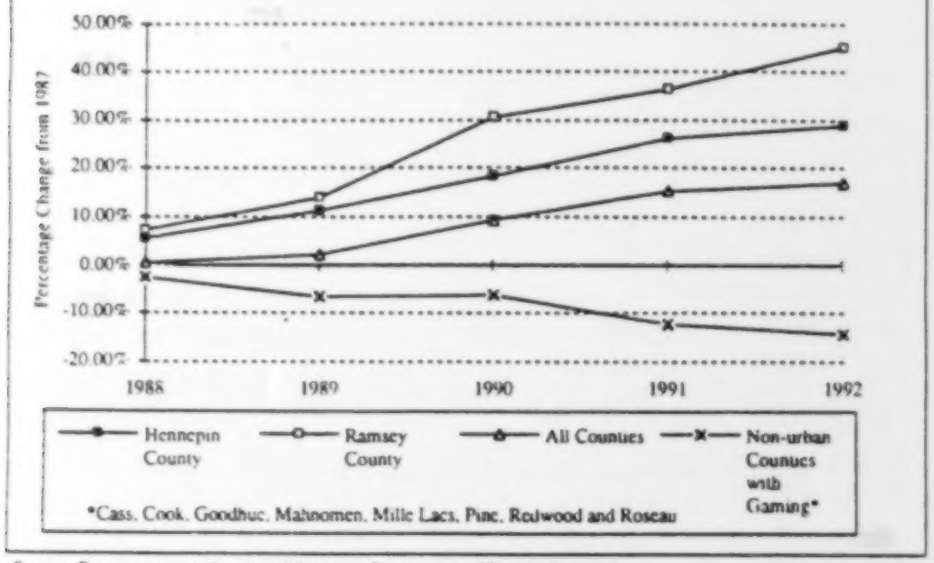
* Cass, Cook, Goodhue, Mahnomen, Mille Lacs, Pine, Redwood and Roseau

Source: Minnesota Department of Human Services.

From 1987 to 1992, the number of AFDC recipients increased by 45% in Ramsey County, 29% in Hennepin County, and 17% in the state as a whole. During the same five-year period, the combined number of AFDC recipients in the eight non-urban counties with gaming declined by 14%. Exhibit 8 graphically displays the percentage change from 1987.

Exhibit 8

Human Services—Changes in AFDC Recipient Counts



Source: Recipient count: data from Minnesota Department of Human Services

The declines in AFDC recipients in the non-urban counties may consequently free up federal and state resources which could be used to help offset the cost of increased recipient numbers in other counties.

The presence of Tribal gaming in Minnesota has led to many jobs. These jobs are proportionately employing a large number of people (Indian and non-Indian) who might typically have difficulty finding a job and depend upon state and federal assistance for their livelihood. This in turn relaxes some constraints on public budgets and allows for further economic development growth.

INDIRECT EMPLOYMENT

A study prepared by the Minnesota Planning Agency used the Regional Economic Model, Inc. (REMI) to estimate the gross direct, indirect and induced annual statewide impact of Tribal gaming in Minnesota as follows:

Total jobs	32,700
Direct jobs at January 1993	10,353
Indirect jobs	22,347

See Minnesota Planning Agency publication, *Minnesota Gambling 1993*, page 11.

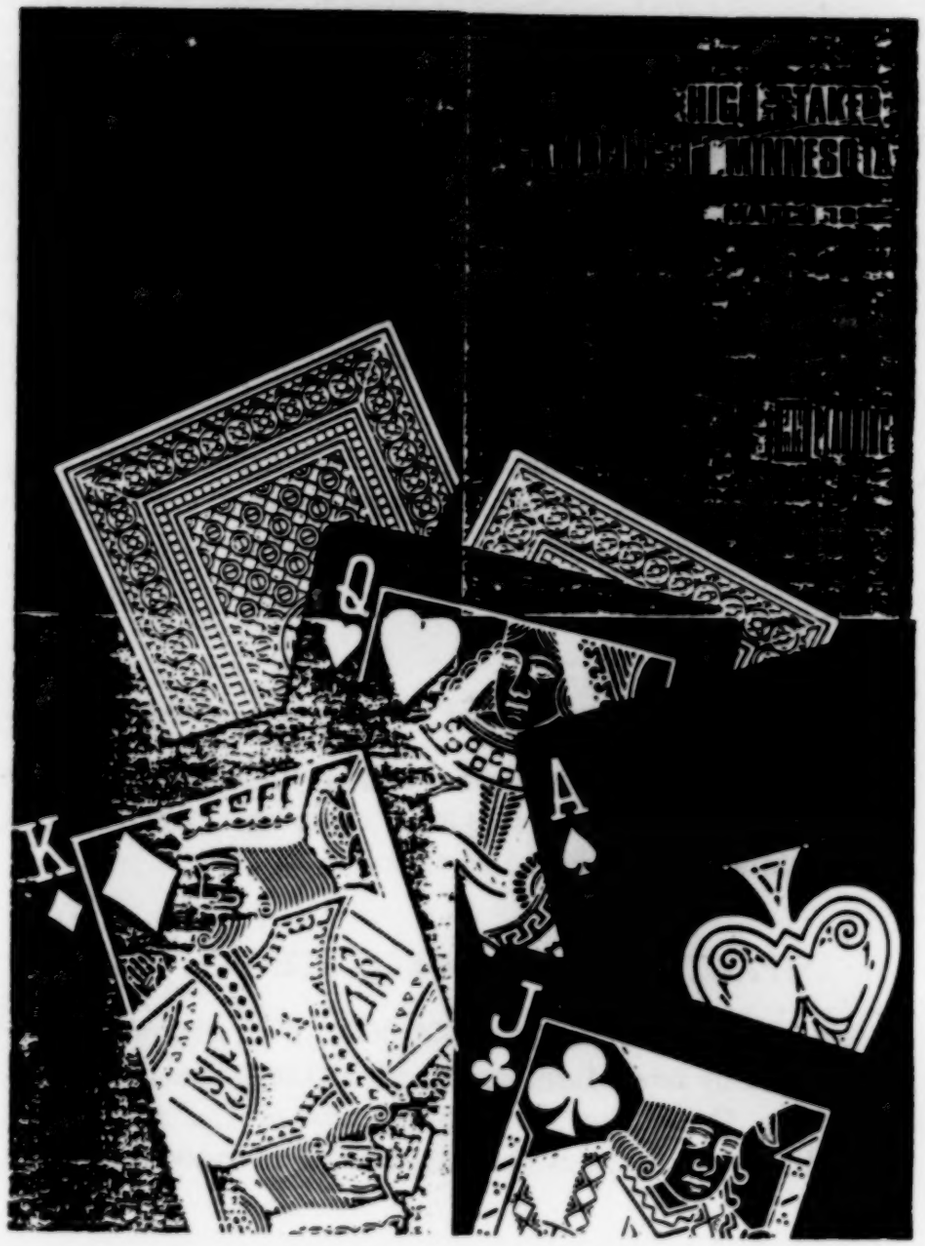
OUT-OF-STATE VISITORS

A study by the Minnesota Planning Agency estimated that 20% of all visitor days to casinos are by non-Minnesotans. The REMI model used in the study estimated the total impact of visitors as follows:

Jobs	7,600
Gross product (value of goods and services)	$245 million

See Minnesota Planning Agency publication, *Minnesota Gambling 1993*, page 11.

Appendix 5


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J

ESTIMATED GROSS ANNUAL ECONOMIC IMPACT OF TRIBAL GAMING

- Actual casino employment (Jan 1992): 5,747 people
- Estimated annual visitor days: 5.9 million
- Estimated amount wagered (1991): $900 million
- Estimated gross revenues to casinos: (after prizes, 1991) $180 million

Using these figures, the Regional Economic Model, Inc. (REMI) estimates the gross direct, indirect and induced annual statewide impact of Tribal gaming as follows:

- Jobs 13,700 jobs
- Gross product (value of goods and services) $550 million

Major categories of jobs generated are eating and drinking establishments, retail, lodging, cleaning, construction, wholesale and professional services.

IMPACT FROM OUT-OF-STATE VISITORS

An estimated 15 percent (900,000) of all visitor days to casinos are by non-Minnesotans. Many come specifically for gambling. Others are tourists already in the state. The REMI model estimates the total impact of these visitors to be:

- Jobs 2,300
- Gross product (value of goods and services) $90 million

The estimates reflect total activity derived from tribal gaming, not all of which is *new* activity. Some represents a shift of Minnesota and tourist consumer expenditures from other activities. Some is new economic activity generated by

new tourist spending or increased resident spending. These estimates are approximations based on annualization of limited available monthly data. Available economic models are not easily calibrated for the gaming industry.

Source: REMI model, MN Office of Tourism, MN Planning estimates.

Appendix 6

MINNESOTA GAMBLING 1993



LCPLANNING

PERCENT OF TRIBAL GAMING CUSTOMERS FROM OUTSIDE MINNESOTA

Grand Portage Casino, Grand Portage	90%
Lake of the Woods Casino, Warroad	50%
Jackpot Junction Casino, Morton	42%
Shooting Star Casino, Mahnomen	35%
Treasure Island Casino, Red Wing	25%
Big Bucks Casino, Cloquet	20%
Fond du Luth Casino, Duluth	20%
Northern Lights Casino, Walker	20%
Fortune Bay Casino, Lake Vermilion	15%
Mystic Lake Casino, Prior Lake	15%
Grand Casino Hinckley, Hinckley	12%
Grand Casino Mille Lacs, Garrison	12%
Firefly Creek Casino, Granite Falls	10%
Palace Casino, Cass Lake	10%

- The percentage of non-Minnesotans visiting tribal casinos increased from 15 percent in 1991 to 20 percent in 1992.

- Total visitor days increased from 6 million in 1991 to 12.9 million in 1992.

Source: Tribal officers and casino managers.

. . . time of this report, information was not available on the effect of recent developments on bars and restaurants in casino and adjacent counties.

Census data for 1990 shows that 44 percent or 20,730 Minnesota Indians were living in poverty, compared to 10 percent of the general population. The unemployment rate for Indians in 1990 was 20 percent, compared to 7 percent for the general population. Recent figures show Indian employment at casinos increasing by more than 87 percent in the past year, to just over 3,000 in January 1993.

The Mille Lacs Band of Ojibwe, owners of Grand Casino Mille Lacs and Grand Casino Hinckley, report they have provided jobs for any band member wanting to work. The Shakopee Mdewakanton Dakota Community, owners of Mystic Lake Casino, initiated a program for urban Indians from Minneapolis and St. Paul, offering job training and transportation from inner-city areas to the casino. One hundred twenty Indians participate in this program, which has plans to expand to non-Indians.

Job creation for non-Indians has exceeded that of Indians. Indeed, one might see Indian gaming as the largest federal employment scheme in many years. This is noteworthy because the gambling industry employs large numbers of people in jobs that require only short-term training — the type of jobs that increasingly have been shifted to less-developed countries in other industries. Indian casinos also employ growing numbers of professionals in marketing, accounting, management and security. Tribal officials report that Indian casinos employ 10,350 workers, of whom 8,400 work full time.

The number of visitor days to casinos by non-Minnesotans nearly tripled between 1991 and 1992. If a person spends all or part of a day at a tourist-related facility, it is counted as a visitor day. Out-of-state visitors to casinos are having a significant economic effect on Minnesota. According to the Department of Trade and Economic Development these visitors were responsible for a $245 million dollar increase in the state's gross product and the creation of 7,600 jobs. Estimates were developed using the Regional Economic Model and represent total economic activity derived from tribal gaming, not all of which is new activity. In part, these estimates represent a shift of Minnesota and out-of-state tourist consumer expenditures from other activities. The numbers also include new economic activity generated by new tourist spending or increased resident spending.

Jobs created directly or indirectly by casino gambling have brought many people from welfare to the work force. In the 10 casino counties, the average number of people receiving Aid to Families with Dependent Children each month declined by 3.1 percent from 1990 to 1992; this decline represents 574 people moving off welfare. At the same time, the economic recession was increasing the number of recipients in the rest of the state by 14.6 percent. If there had been no casinos, and the welfare rate in the 10 counties had climbed as fast as the rest of the state, the costs of AFDC would now be $7 million per year higher, not including additional medical benefits or food stamps.

The new jobs have gone mainly to the American Indian community and the white population; both groups show a reduction in statewide AFDC benefits. All other racial groups had an increase in AFDC recipients. From 1991 to 1992, the number of adults statewide on AFDC decreased 6.4 percent for American Indians, from 4,451 to 4,168, and decreased 1.4 percent for whites, from . . .

Appendix 7

INDIAN GAMING REGULATORY ACT

HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
ONE HUNDRED THIRD CONGRESS
SECOND SESSION
ON

OVERSIGHT HEARING ON THE NEED FOR
AMENDMENTS TO THE
INDIAN GAMING REGULATORY ACT

MAY 17, 1994
WASHINGTON, DC

PART 3

PRELIMINARY ESTIMATES OF ECONOMIC IMPACTS RELATED TO TRIBAL GAMING IN SOUTH DAKOTA

Submitted by: Dr. Michael K. Madden
Professor of Economics, University of South Dakota

Tribal gaming commenced in South Dakota in October of 1990 with the opening of the Royal River Casino in Flandreau. Since then four additional casinos have begun operations with the latest occurring in the spring of 1993. (Refer to the accompanying state map for their respective geographical locations.)

The Travel Industry

During the last nine years, I have been responsible for measuring the economic impacts of the vacation travel industry throughout the state and have accordingly tracked the economic impacts of tribal casinos as they have developed since 1990. The added travel spending in each of the counties in which tribal casinos are located has been substantial. Prior to tribal gaming, aggregate travel spending in these five counties totaled about $8 million with Codington County (Watertown) accounting for the bulk of this amount. In 1993, travel spending in these five counties amounted to about $31 million, an increase of 281%. Together, these counties now account for nearly 8% of tourism spending in the entire state compared to about 2% prior to tribal gaming.

Economic Impacts

Visitor spending translates into economic impacts such as jobs and earnings. Although no formal economic impact study has been undertaken to date, preliminary discussions have begun concerning the completion of such a study in the near future. Upon the completion of this research, more precise economic estimates will be possible. The following

economic impact highlights are based on an informal survey of the five operating tribal casinos.

- Direct employment in these casinos today amounts to more than 1,700. Assuming indirect employment impacts are similar to the South Dakota travel industry in general, an additional 570 jobs have been generated in the state through the multiplier effect. The total impact on employment is therefore estimated to be 2,270.

- It is estimated that 70 to 75 percent of the direct employment positions are held by Native Americans. This translates into an increase of between 1,200 and 1,300 new jobs held by Native Americans in South Dakota. The remaining 25 to 30 percent of the jobs represent new employment opportunities for South Dakotans living in communities near the casino operations.

- New wages and salaries in the regions surrounding the tribal casinos are estimated to be more than $25 million. Because most regions surrounding the tribal casinos are of low population, these added earnings have produced significant relative impacts on personal income within communities.

- Non labor operating expenditures amounts to at least $22 million for the five operating casinos. These expenditures are related to the required business purchases of goods and services from local and non local vendors. Examples include food and beverages, utilities and various other miscellaneous purchases.

- In addition, an undetermined amount of business activity occurs through spending by casino employees.

- It is estimated that tribal profits derived from gaming operations amounted to nearly $9 million in 1993.

- The use of these profits vary from tribe to tribe. Some of the resources have been allocated to infrastructure improvements relating to the casinos themselves. Examples include lodging and camping facilities as well as additions to casino capacity. Other economic development programs have also been pursued. Training and educational programs for tribal members have been instituted or expanded within a number of the tribes.

- At least $750,000 in contributions have collectively been made to tribal and other social programs. Examples include day care facilities, senior citizen programs, law enforcement and treatment centers.

The Future

There are at least three additional tribal casinos at some stage of planning in South Dakota. (See attached map.) If economic growth occurs in proportion to what has been demonstrated since 1990, a number of inferences can be drawn. Vacation travel spending related to tribal casinos will grow from $31 million today to $52 million. Total employment will increase from 2,270 to 3,770 and earnings are expected to grow from $22 million to $37 million.

Conclusion

From an economic standpoint tribal gaming has proven to be an effective rural economic development tool. The added economic activity has been distributed in the communities surrounding the casinos producing economic vitality which obviously would not have occurred in the absence of tribal gaming enterprises.

SUPPLEMENTAL SHEET

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TOPICAL OUTLINE

Preliminary Estimates of Economic Impacts Related to Tribal Gaming in South Dakota

A. The Travel Industry
B. Economic Impacts
C. The Future
D. Conclusion

	Jobs	% Ind.	% Non Ind.	Earnings	Op. Exp.	Soc. Spend	Infrastruct	% of Change in Tourism	
Fort Randall	654	66.0%	34.0%	$ 7,500,000	$12,400,000	$ 100,000	Sewer, Water, Lodging	146	6,306,597
Golden Buffalo	171	85.0%	15.0%	1,900,000	1,600,000	127,000	Lodging, RVPark A	131	6,711,688
Lode Star	141	91.0%	9.0%	1,100,000	1,027,000	100,000			1,342,966
Royal Fever	345	36.0%	64.0%	3,644,000	3,500,000	150,000		642	4,712,429
Dakota Sioux	391			4,400,000	3,700,000	150,000		66	13,125,165
	1,702	60.5%	30.5%	18,344,000	22,227,000	627,000			31,258,845
	562			7,337,600					
	2,264			25,681,000	22,227,000	627,000			
	3,771			42,785,546	37,030,182	1,044,582			

Appendix 8

INDIAN GAMING REGULATORY ACT

HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARING ON THE NEED FOR
AMENDMENTS TO THE
INDIAN GAMING REGULATORY ACT

APRIL 26, 1994
WASHINGTON, DC

PART 2

Testimony

of

JoAnn Jones, Tribal Chair,

&

Alvin Cloud, Gaming Liaison

Wisconsin Winnebago Nation

before the

Senate Committee on Indian Affairs

U.S. Senator Daniel Inouye, Chair

U.S. Senate Hearing Room

216 Hart Senate Office Building

Washington D.C. 20510

April 26, 1994

The Wisconsin Winnebago Nation has two nationally recognized firms that assist in management and oversight. The Accounting firm Arthur Anderson conducts all gaming audits and financial reports required under tribal, state and federal law.

Attorneys Process & Investigation Services Inc. (API), a nationally respected private investigative consulting agency, conducts the background investigations and regulatory enforcement required by tribal ordinance, tribal/state compact and IGRA. With API, we have a top notch private investigation firm of 35 people with an estimated 500 years of law enforcement experience at our disposal.

API assisted us by providing information that was not available from state or federal sources. As a result, serious suitability issues were identified and the Winnebago Nation took appropriate regulatory actions. This information helped our operations keep their integrity and protect our Nation. Again this information was not available to us from state or federal sources.

All prosecutions of state criminal law are provided by the State of Wisconsin under the tribal/state compact entered into by the Nation and the State in July of 1992.

Many people believe that Indian country cannot possibly have the level of security and control that Nevada and New Jersey have over their gaming operations. That is not true. The Wisconsin Winnebago have state-of-the-art security, surveillance, on-line accounting, and audit controls. The Winnebago employ nearly 1700 people at 3 casinos. More than 300 of these employees are working in the security, surveillance and accounting areas to insure the integrity of the games, to protect our customers and to protect the Winnebago Nation.

We have these controls because it our people's money that is at stake. We know what can happen. We want to do

everything that we can to protect these enterprises because it is our children's future that is at stake. We challenge anyone to come to the lands of the Winnebago Nation to review our personnel, procedures and equipment. If any governmental body, local, state or federal is doing more to protect the integrity of its games, its customers, and its citizens we want to know about it.

The Winnebago Nation's gaming operations are very successful in large part because the Nation has a strong and effective gaming ordinance; experienced legal, accounting and investigative personnel; and a dedicated Gaming Commission with all the regulatory and enforcement authority necessary for the maintenance of successful gaming.

Benefits of Indian Gaming

Indian gaming is not about gambling. It is about survival and bringing my people out of the third world conditions that they have lived in for generations. It is about sovereignty and the right of one government to operate free from the interference of another government. Finally, it is about an agreement and compromise worked out among sovereign governments.

When Congress established the National Indian Gaming Regulatory Act it said the act had three purposes: Promote tribal economic development, self sufficiency, and strong tribal government. Indian gaming in Wisconsin is doing all of these things and more.

I have heard the testimony given at the recent hearing regarding the positive impact that Indian gaming has had on not only tribal, but on local economies at well. The situation is not any different in Wisconsin, but the facts bear repeating.

The Winnebago Nation employs more than 2000 people. Nearly 80% of these people are employed at our gaming

enterprises. Employment has quadrupled in the last two years. More than 60% of these employees are non-Indian. More than 300 of our gaming employees came from the welfare rolls. Statewide, Indian gaming jobs took 800 people off welfare and 1400 more from the unemployment rolls. Casino income is the sole support for the families of nearly 80% of the casino employees. According to Health & Social Service Secretary Gerald Whitburn, state aid to Indian families has dropped. He says that Indian gaming is a major reason for this drop.

Indian gaming has also been a great benefit to the larger community. For example, in Sauk County where one of our casinos is located, unemployment in 1991 was 30% above the state average, now it is only 3% above the state average.

In Wisconsin alone, Indian gaming has created 7000 jobs. Is there someone that has 7000 jobs that will employ these Wisconsin people? According to a Dept. Of Commerce study, when government creates jobs it costs $20,000 per job. Does someone have the $140 million replace the 7000 jobs threatened by attacks on Indian gaming?

The Winnebago Nation has no natural resources and we do not have a significant land base, yet we are expected to provide the same governmental services that the Navajo or the Yakima tribes provide their members. We cannot depend on the federal government to give us the money to provide these services. We cannot depend on the state government to give us the money to provide these services. And we don't want to. We want to provide for our own.

To do this, we need a stable tribal economy. This economy must provide jobs for our people, both skilled and unskilled; this economy must return money back into our community and the pockets of our people; and finally, this economy must allow us to diversify so we can sustain our economy into the future. We know that diversification is the

key to economic survival and that is what we are doing. Gaming has provided the Winnebago with this kind of economy.

For too long our people have existed in poverty. They have been denied jobs. They have . . .

Appendix 9

INDIAN GAMING REGULATORY ACT

HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARING ON THE NEED FOR
AMENDMENTS TO THE
INDIAN GAMING REGULATORY ACT

APRIL 26, 1994
WASHINGTON, DC

PART 2

TESTIMONY
OF
BERNARD BOUSCHOR, CHAIRMAN
SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
BEFORE THE SENATE SELECT COMMITTEE
ON INDIAN AFFAIRS

APRIL 27, 1994

Dear Chairman Inouye and Members of the Committee:

I. Introduction

On behalf of the Sault Ste. Marie Tribe of Chippewa Indians, I wish to express our appreciation for extending to us this opportunity to discuss the implementation of the Indian Gaming Regulatory Act as it relates to Indian gaming operations in the State of Michigan. I am pleased and honored to address you with representatives of the National Indian Gaming Association and Tribal governments from across the Country.

The Sault Ste. Marie Tribe of Chippewa Indians wishes to express to the Committee our concern over recent calls to amend the Indian Gaming Regulatory Act to increase Federal or State regulation of Indian gaming. We believe the success of Tribal gaming operations in Michigan is proof of the fact that Tribal governments are capable of and are more successful when they have the primary role in regulating their own gaming operations.

II. Background

The Sault Ste. Marie Tribe of Chippewa Indians is the largest federally recognized Tribe in Michigan, with over 20,000 members. Located in Michigan's Upper Peninsula, the Tribe provides direct services to members in seven counties (Chippewa, Mackinac, Luce, Alger, Schoolcraft,

Delta and Marquette). Gaming revenues are essential to the provision of services to this population.

Although the Tribe has been conducting a Bingo operation for several years, a small casino was opened in 1985. In 1985 the Tribe began with a 10,000 square foot facility offering blackjack and poker and employing about 89 employees. Today the Tribe operates a 95,000 square foot gaming facility in Sault Ste. Marie, Michigan and another in St. Ignace, Michigan. These casinos offer a wide variety of games including slot machines. The gaming operations includes hotels, a restaurant and gift shops.

The Tribe's gaming operations now employ over 1600 people and produced over 100 million dollars in gross revenue last year. The Tribe is the sole owner and operator of all its' gaming operations.

After over five years of negotiation and litigation, a compact between each of the Michigan Tribes and the State of Michigan was finally signed in August, 1993.

III. Gaming Regulation

The compact between the Tribes and the State stands as a recognition of the Tribes' right to regulate their own gaming operations as sovereign governments, as well as their success at self regulation for over eight years. Under the compact with the State of Michigan, the Tribes maintain the primary responsibility for regulating their own gaming activities. The State's role is limited to monitoring Tribal regulation. The compact does, however, require that certain minimum standards be followed. For instance, the compact specifies that certain Michigan laws pertaining to employment be followed, the Tribes comply with the Bank Secrecy Act and that minimum standards be followed with regard to background checks. (See attachment #1, Compact between the Sault Ste. Marie Tribe and the State of Michigan).

Indian gaming operations in Michigan are operated free of any infiltration by organized crime. These casinos have not generated an increase in criminal activity. Indeed the Sault Ste. Marie tribe of Chippewa Indians works closely with the Federal Bureau of Investigation, criminal investigators with the Bureau of Indian Affairs, Michigan State Police and local police agencies. We have received the support of the Chief of Police of the City of Sault Ste. Marie, officials of the Michigan State Police and other law enforcement officials. (See the attached correspondence from Sault Ste. Marie City Police Chief Fitzgerald and the Chippewa County Prosector Pat Shannon). We consistently work with Canadian police authorities as we are located very near the U.S.-Canadian border. The Tribe has its' own public safety department comprised of thirteen officers. (See attachments; #2, Letter from the Detroit Police Officers Association, #3 Letter to Ted Gatzaros from the Wayne County Sheriff's Department, #4 Letter to Ted Gatzaros from the Wayne County Sherifi s Local 502, #5 Letter from Chief of Police of the City of Sault Ste. Marie to Governor John Engler, #6 Letter from Chippewa County Prosecutor Patrick Shannon to Governor Engler).

The biggest obstacle to effective law enforcement we currently face in Michigan is not inadequate regulation, but inadequate funding and jurisdictional barriers. Indeed, the Sault Ste. Marie Tribe is currently working with local government officials to fund law enforcement services to expand the financial resources available to local law enforcement agencies and thereby improve the availability of police services to local communities as well as the Tribal community. In addition, Michigan Tribes have been working to pass cross-deputization legislation in Michigan to help alleviate the problems imposed by jurisdictional barriers to prosecution of criminal activity.

Effective regulation of their own gaming operations is certainly one of the principal reasons for the success of the Tribe's gaming operations in Michigan. The Sault Ste. Marie Tribe has developed a system of regulation modeled after the systems utilized by the State of Nevada. The minimum internal control standards set up by the Nevada Gaming Control Board have been adapted for use in the Tribe's gaming operations.

In addition to these internal controls, the tribe conducts external, independent audits. The company conduction the audit, Anderson, Tackman & Company has been licensed by the State of Wisconsin for work in casinos. These audits have been approved by the office of the Inspector General.

The Tribe has spent a great deal of time and money to employ the best possible security measues to insure the integrity of its' gaming activities. We have included a state of the art camera security system utilizing over 364 cameras in one facility alone. The entire operation of the facility is captured on video tape. The tapes themselves are retained until the accounting paperwork is balanced out. We have purchased a player tracking system and a slot information system that allows us to compare the theoretical hold against the actual. Any discrepancy is investigated. Computerized accounting records are checked daily, weekly, quarterly, and finally yearly. Background checks are performed on every employee. This list in not meant to be exhaustive, but representative of the complexity of the regulatory measures we have taken.

The Tribe currently complies with the Bank Secrecy Act. W2-G forms for gambling winnings are required to be filled out and filed. 1042-S forms for non-resident aliens are filed. Currency Transaction Reports are filled out and filed.

In addition to these measures the Tribe has instituted an internal system of checks and balances. The management of

the gaming operations have been separated from tribal governmental operations with the creation of an Economic Development Commission. The Economic Development Commission must report to the Tribal Board of Directors as to the efficiency and integrity of the gaming operations. The casino comptroller and assistant comptroller are in fact Tribal employees, not casino employees. Therefore, they are wholly independent of casino management and report directly to the Tribal Chief Financial Officer. The legal representation of the Casino is provided by the Tribal Attorney's office. These officials are responsible to the Board of Directors. They in effect function as watchdogs for the Tribe.

Furthermore, the Tribe has adopted an extensive gaming ordinance which establishes a Tribal Gaming Commission independent of both the Tribe Board of Directors and the Economic Development commission. The gaming Commission will license all management officials and gaming employees as well as all gaming vendors. The Commission will possess independent audit powers (See attachment #7; Tribal Gaming Ordinance).

The Sault Ste. Marie Tribe is proud of its' success as well as the integrity of its' gaming operations. After all it is the Tribes that have the most to lose from badly run gaming operations. It stands to reason that the Tribes themselves are in the best position to regulate their own gaming operations, as it is they who have the most to lose. We have established ourselves as successful . . .

Appendix 10

INDIAN GAMING REGULATORY ACT

HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARING ON THE NEED FOR
AMENDMENTS TO THE
INDIAN GAMING REGULATORY ACT

APRIL 26, 1994
WASHINGTON, DC

PART 2

Sault Area
Chamber of Commerce
2581 I-75 Business Spur
Sault Ste. Marie, Michigan 49783
(906) 632-3301 • Fax (906) 632-2331
1-800 MI-SAULT

May 13, 1993

Governor John Engler
Capitol Building
Lansing, MI 48909

Dear Governor Engler:

Those of us in Sault Ste. Marie who feel responsible in some measure for maintaining a viable economy, shudder a bit when we hear of any potential threat to tribal gaming operations. Therefore, the Board of Directors of the Sault Ste. Marie Chamber of Commerce strongly supports an agreement between the State of Michigan and Native American Tribes which will assure that the tribes can continue present gaming operations on reservation lands.

There is no doubt that during the early years of the development of the Kewadin Casino in Sault Ste. Marie, many area business people were apprehensive and uncomfortable with the expansion of gambling. We predicted that there would be a great deal of negative impact. We could see the possibility of an increase in crime, even some involvement of organized crime, unfair competition which might destroy certain types of businesses and an unhealthy situation arising between the local community and an autonomous Indian society.

None of these predictions have come true. The Sault Tribe of Chippewa Indians are very good neighbors. The profits from their operations have made possible a dramatic improvement in the standard of living, not only for tribal

members, but for the entire community. Hundreds of jobs, good jobs, are available. Social programs, good housing, auxiliary businesses and new opportunities exist at a level we never anticipated. After recovering from the economic doldrums following the closure of the local air force base in the 1970's, our entire area is enjoying a revival. Tourism is growing and developing into a year-round industry, in part, because of the attraction of the casino. Visitors who come to gamble, see our beautiful peninsula, and return with the families to enjoy the sights.

It would be tragic to have anything happen which might reduce the benefits derived from tribal businesses. They, and we, need your support.

[SIGNATURES]

ATTACHMENT 10

Appendix 11

INDIAN GAMING REGULATORY ACT

HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARING ON THE NEED FOR
AMENDMENTS TO THE
INDIAN GAMING REGULATORY ACT

APRIL 26, 1994
WASHINGTON, DC

PART 2

ST. IGNACE, MICHIGAN
OFFICE OF THE MAYOR
BRUCE J. DODSON

TO WHOM IT MAY CONCERN,
BERNARD BOUSCHER, SOO TRIBE

DEAR BERNARD,

I WISH YOU TO KNOW ABOUT THE IMPACT YOU AND THE CASSINO HAVE ON THE ECONOMY AND TOURISM IN THE STRAITS AREA. THIS VENTURE HAS NOT ONLY IMPROVED THE OVERALL ECONOMY OF THE AREA, BUT HAS REDUCED THE WELFARE ROLL OF OUR COUNTY BY THE LARGEST PERCENTAGE SINCE THE BUILDING OF THE MACKINAC BRIDGE, WHEN EVERYONE HAD A JOB. THE DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES FOR MACKINAC AND LUCE COUNTY TOLD ME AT LUNCH LAST WEEK, THAT EVERY ABLE BODIED PERSON IS NOW WORKING IN A THREE COUNTY AREA, INCLUDING ALL MEN, WOMEN, AND TEENAGE PERSONS. THIS MUST BE A FIRST, AND IN AN AREA OF 47% UNEMPLOYMENT THE TRIBE HAS CERTAINLY BEEN ONE OF THE MAIN CONTRIBUTORS.

WITHOUT THE VENTURES OF THE SOO TRIBE, CASSINO, HEALTH CARE PROGRAMS, HOME BUILDING, ETC., THIS AREA WOULD BE IN A DIFFERENT FINANCIAL CONDITION IN THIS 1993 ECONOMY.

AS MAYOR OF THE CITY OF ST. IGNACE, I CERTAINLY HOPE YOU CONTINUE TO DEVELOPE AND EXPAND THE SCOPE OF THE SHORES CASSINO AND THE AREA. YOUR EXPERTISE IN ECONOMIC DEVELOPMENT IS SECOND TO NONE, AND IS A WELCOME CHANGE FROM THE OLD VIEW OF THE TRIBE. KEEP UP THE FINE WORK, AND WE ARE HERE TO HELP IN ANY WAY POSSIBLE.

SINCERELY,

BRUCE J. DODSON, MAYOR OF ST. IGNACE

Home of Michigan's Largest Antique Auto Show

ATTACHMENT 11

Appendix 12

INDIAN GAMING REGULATORY ACT

HEARING
BEFORE THE
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

S.2230

AMENDMENTS TO THE
INDIAN GAMING REGULATORY ACT

JULY 19, 1994
WASHINGTON, DC

PART 1

STATEMENT OF RAY HALBRITTER
NATION REPRESENTATIVE
ONEIDA INDIAN NATION OF NEW YORK
BEFORE
THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
JULY 19, 1994

Mr. Chairman, my name is Gaiongwilode. I am also known as Ray Halbritter. I am the Nation Representative of the Oneida Indian Nation of New York. Thank you for this opportunity to appear before the Committee on Indian Affairs to present our view on a matter that is of vital concern to the Oneida Indian Nation of New York and other sovereign Indian governments. This matter is the future of Indian gaming as a means to empower Indian Nations and Tribes to be self-sufficient, self-governing and economically developed.

Congress enacted the Indian Gaming Regulatory Act in 1988 "to promote tribal economic development, tribal self-sufficiency, and strong tribal government." The Act is doing just that. No useful purpose would be served by replacing the Indian Gaming Regulatory Act with a new more complex statutory scheme and a larger federal bureaucracy to usurp the regulatory roles now negotiated, agreed upon and played by Indian Nations and States.

I will refer to the casino enterprise of the Oneida Nation to illustrate the current success of the Indian Gaming Regulatory Act.

A year ago today, the Oneida Indian Nation of New York opened Turning Stone Casino to the public. Turning Stone is the first Indian owned and operated casino over in New York State and the first casino of any kind in New York in over 100 years.

Because of Turning Stone, our once impoverished Oneida Nation is now the second largest employer in Central New York. We employ nearly 2000 people, 88% of whom are non-Indian. Our payroll is 1.1 million per week in an economically depressed area of Central New York. Thank to revenue from the casino, the Nation is able to house, feed, and educate its people, to nurture and enhance the Oneida's unique culture, to repossess ancestral homeland, to significantly benefit the local community, to research and develop other business enterprises, and to otherwise provide for the seven generations yet to come as our culture requires of us to do.

The Nation offers casino gaming subject to a comprehensive compact negotiated and entered with the State of New York. The Nation and the State negotiated for almost a year to produce a 41 page compact with 159 pages of detailed appendices of game rules, standards of operation and management, accounting requirements, and procedures to reimburse the State its regulatory costs.

The regulatory framework provided by the Indian Gaming Regulatory Act compacting process respects the sovereignty of both Nation and State. The State and the Nation, not the federal government, determine the games offered, their rules, and the other internal controls installed at the casino. The Nation-State compact also allocates responsibility between Nation and State regulatory authorities, sets the standards for licensing of facilities, employees and vendors, and establishes parameters for background investigations, law enforcement and all other . . .

SUMMARY OF DEVELOPMENT INITIATIVES

for the
ONEIDA INDIAN NATION OF NEW YORK

JUNE 1994

recognized Nations in the area and intermarried, there are very close social and economic ties with these other Nations. The Oneida Nation lineage is by matrilineal descent. Therefore, many Oneida children of mothers with other tribal affiliations are not included in the Oneida Nation membership. In addition, to be officially enrolled with the Oneida, an individual must be at least one-quarter degree Indian blood.

The Oneida Nation has chosen to include these other Federally recognized Indians in the spirit of cooperation for they are a part of the fabric of the larger community. The Nation continues to provide comprehensive services to all Oneida Indian Nation members as well as those federally recognized Indians with whom they have coexisted for centuries.

HISTORIC NEEDS

The problems and needs of the community are not unlike those typically plaguing Native Americans everywhere — and good portion of the non-Indian population as well. According to the 1991 Health Needs Assessment, the Oneidas are plagued by the same health problems confronting other American Indians today: obesity, sedentary life styles, diabetes, and alcohol/substance abuse. Preliminary results from the Oneida Nation Comprehensive Survey (ONCS) reveal that 65% of those Oneida households surveyed earned an annual income of less than $15,000 per year. Many Oneida members lived in environments where plumbing facilities were inadequate or nonexistent and insufficient heating presented a hazard to health and safety. Until recently there were no fire hydrants and solid waste disposal services were inadequate.

Before 1990, when economic initiatives infused needed resources, many Nation members were unable to develop educational skills needed to find suitable employment. A

44% unemployment rate, lack of community facilities, and inaccessibility to quality health care and other public services made life difficult for members. Many of the Nation's young people moved away seeking employment opportunities elsewhere. However, the majority of these people have expressed the desire to return to their Oneida home to look for permanent jobs and to make permanent homes.

No. 94-12

(14)

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In The

Supreme Court of the United States

October Term, 1994

SEMINOLE TRIBE OF FLORIDA,

Petitioner,

v.

STATE OF FLORIDA, et al.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* TOHONO O'ODHAM NATION, WHITE MOUNTAIN APACHE TRIBE, and PASCUA YAQUI TRIBE IN SUPPORT OF PETITIONER SEMINOLE TRIBE OF FLORIDA

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QUESTION PRESENTED

DOES THE *EX PARTE YOUNG* DOCTRINE PERMIT SUITS AGAINST A STATE GOVERNOR FOR PROSPECTIVE INJUNCTIVE RELIEF TO ENFORCE LEGISLATION ENACTED PURSUANT TO THE INDIAN COMMERCE CLAUSE, ARTICLE I, SECTION 8, CLAUSE 3 OF THE CONSTITUTION?

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INTEREST OF *AMICI CURIAE*

The Tohono O'odham Nation, White Mountain Apache Tribe, and Pascua Yaqui Tribe (the "Tribes") are federally recognized Indian tribes occupying and governing Indian lands within the State of Arizona.[1] The Pascua Yaqui Tribe and the Tohono O'odham Nation have been operating high stakes gaming on their lands near the City of Tucson, Arizona since the mid-1980s. After Congress adopted the Indian Gaming Regulatory Act in 1988, codified at 25 U.S.C. § 2701 *et seq.*, ("IGRA") the *amici* Tribes requested that the Governor of Arizona enter into class III tribal-state gaming compacts. The Tribes and the Governor could not agree on compact terms, and so in 1992 the Tribes brought an action in federal court for the District of Arizona to invoke the remedial provisions of IGRA and obtain compacts.[2]

The *amici* Tribes and nearly 100 other tribes throughout the country have successfully followed the procedures under IGRA and now have compacts with states.[3]

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[1] Counsel of record for each party in this case consent to the filing of this brief. Letters of consent have been lodged with the Clerk.

[2] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292 (D.Ariz. 1992), *appeal dismissed*, No. 92-16954 (9th Cir. Mar. 14, 1994).

[3] IGRA has been widely successful in resolving disputes over Indian gaming. As of February 1995, 98 tribes in 22 states had class III compacts approved by the Secretary of Interior under IGRA. Bureau of Indian Affairs, *Tribal-State Compact List* (Jan. 26, 1995) (unpublished list on file with the Bureau of Indian Affairs).

For the *amici* Tribes, gaming under their approved compacts is now providing substantial funds to subsidize badly needed governmental services and build significant capital infrastructure for future development. Their compacts will not be directly affected if the Court affirms the Court of Appeals' decision below. However, the *amici* Tribes have already faced one collateral constitutional challenge to their compacts by third parties. If IGRA is found to be unconstitutional in this case, even in part, all settled compacts will be subject to the risk of further litigation and the success of class III gaming will again be frustrated.

The experience of the *amici* Tribes and the State of Arizona under IGRA demonstrates that the Act's remedial provisions actually work and, if pursued in *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994), would not violate the Eleventh Amendment rights of the State of Florida or its Governor. As happened in Arizona, government officials in Florida will be able to choose whether they want to participate in each stage of the IGRA process. Should the State choose not to participate, no Florida official will be subjected to any coercive order from the district court. Florida's Eleventh Amendment concerns are completely theoretical and should be rejected.

Opposition to gaming on Indian reservations, for whatever reason, does not make out an Eleventh Amendment claim. After several years of public debate and much input from the states, IGRA was carefully crafted by Congress to fully protect the states' Eleventh Amendment rights and, at the same time, encourage states and tribes to enter into compacts. The IGRA remedial process

was adopted to permit states to regulate gaming, if they so desired, but it was not intended to allow states to veto a tribe's right to conduct class III gaming.[4]

The Experience of Arizona Tribes under IGRA

The Tohono O'odham Nation began operating class III gaming on its lands near Tucson, Arizona before Congress adopted IGRA.[5] The Pascua Yaqui Tribe also offered high stakes bingo and video gaming machines to the public on its Reservation facility on the edge of Tucson before 1988.[6] Beginning in November 1991, the White

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[4] S. Rep. No. 446, 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 3071, 3079 ("It is the Committee's intent that the compact requirement for class III not be used as a justification by a state for excluding Indian tribes from such gaming . . . "). *See Statement of Senator D. Inouye, Chm., Select Comm. on Indian Affairs, Before the Oversight Hearing on the Implementation of the Indian Gaming Regulatory Act*, May 6, 1992, *reproduced* at App. 4.

[5] The 2.8 million acre Reservation of the Tohono O'odham Nation is in southern Arizona, sharing a large common boundary with Mexico. There are about 18,000 tribal members. The Tohono O'odham Nation has very limited natural resources and almost no infrastructure for economic development. There are very few employers on the Reservation and, consequently, the tax base is quite small. In 1992, nearly one-half of all of the Nation's general operating funds, other than those funds received for the administration of state and federal contracts and grants, came from gaming. *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292 (D.Ariz. 1992) (Ex. G. Moore Aff., C.R. 77).

[6] The Pascua Yaqui Tribe has over 7,000 members. In 1991, over 66 percent of the *employed* tribal members earned less than $7000 per year. *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292 (D.Ariz. 1992) (Ex. F. Gastelum Aff., C.R. 77).

Mountain Apache Tribe opened two small gaming facilities on its Reservation, one at Hondah near Pinetop, Arizona and one at the Tribe's Sunrise Ski Park.[7] The governments of the *amici* Tribes relied heavily on gaming as a major supplement to scarce government revenues.

After IGRA became law and pursuant to its provisions, the Tribes asked the State of Arizona to negotiate class III compacts so the Tribes could continue their gaming businesses. Despite numerous requests and efforts on both sides during the administrations of several Governors of Arizona, the State would not agree to compacts with tribes in Arizona. Negotiations between the State and the Tribes reached an impasse due solely to a dispute as to the scope of class III gaming allowable in Arizona and the State's duty to negotiate over various forms of class III gaming activity for possible inclusion in a tribal-state compact.[8] In the meantime, the Tribes' high stakes gaming operations remained open.

On February 24, 1992, the district court in Arizona allowed the *amici* Tribes to intervene in a previously-filed action in order to pursue a claim against the Governor and the State of Arizona under IGRA. *See* 25 U.S.C. § 2710(d)(7)(B). The Tribes sought a declaration that certain gaming, including video gaming, was "permitted for

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[7] The gaming facilities employed approximately fifty persons, ninety percent of whom were tribal members. *Yavapai-Prescott Tribe v. Arizona*, 796 F.Supp. 1292 (D.Ariz. 1992) (Ex. H. Lupe Aff., C.R. 77).

[8] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. at 1294.

any purpose" in Arizona, and thus, could be included in a compact.[9]

The Governor took the position that IGRA only required negotiation of compacts for gaming which was both authorized and regulated under Arizona law. According to the Governor, such gaming included only lottery and para-mutuel wagering on horse and dog racing. The Tribes maintained that other forms of gaming should be included in compacts because casino games were both authorized under Arizona law and widely used for charitable fund raising events, and because Arizona law authorized social gambling and the widespread sale and use of slot machines.[10] The Tribes and the Governor stipulated to the court that negotiations had reached an impasse on this legal issue.[11]

The Governor also moved to dismiss the Tribes' Complaint on the grounds that the provisions of IGRA which direct states to negotiate with tribes in good faith, and which authorize the district court to appoint a mediator, violate the Tenth Amendment to the United States Constitution.[12] Arizona never asserted an Eleventh Amendment defense in this litigation.

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[9] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. at 1294.

[10] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292 (D.Ariz. 1992) (Pls.'/Intervenors' Mot. for Summ. J., May 4, 1992, C.R. 77).

[11] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. at 1294.

[12] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292 (D.Ariz. 1992) (State's Mot. to Dismiss, March 23, 1992, C.R. 58).

On May 12, 1992, while summary judgment motions were pending in the district court, federal marshals enforced warrants at all on-going tribal gaming operations in Arizona, taking approximately 750 video gaming machines, including 257 machines from the Tohono O'odham Nation.[13]

Arizona tribes were placed in a difficult situation. Federal law granted the tribes the right to engage in class III gaming under compacts, but the Governor of Arizona refused to agree to compacts.[14] The *amici* Tribes could not continue operating their video machines without compacts. The Tribes had federal rights but for four years they had tried unsuccessfully to negotiate compacts. The IGRA remedial provisions were the only effective way to enforce their federal rights.

The public overwhelmingly supported the continuation of class III gaming by the tribes.[15] The Governor of Arizona reacted by offering a uniform compact limiting each tribe to only 250 machines, regardless of tribal population or financial need. The smaller tribes in Arizona accepted the Governor's offer. The *amici* Tribes did not.

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[13] Michelle Henry, *Tribes to March on Capitol*, Tempe Daily News Trib., May 17, 1992, Jonathan Sidener, *U.S. Offers Tribes Compromise*, Ariz. Republic, May 15, 1992, at A-2.

[14] The Governor of Arizona was a defendant in *Yavapai-Prescott* because under state law he was the state official who assumed the federal law duty to negotiate with tribes. *See* A.R.S. § 5-601. The Governor of Florida is in the same position in the *Seminole* case. (*See* Brief of Petitioner Seminole Tribe at 23.)

[15] *See, e.g.*, Editorial, *Don't Deny Indians' Right To Try Gaming Industry*, USA Today, May 20, 1992, 10A.

Instead, these Tribes continued to pursue their IGRA remedies under the supervision of the federal court.[16]

The District Court's Rulings

Based upon a detailed factual record of the extent and types of gaming conducted in Arizona, the district court granted summary judgment in favor of the Tribes and, pursuant to 25 U.S.C. § 2710(d)(7)(B)(iii), declared a 60-day time limit for the parties to conclude negotiations for class III compacts. The court refused to specify what types of gaming must be the subject of negotiation. *Yavepai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. at 1296. The legislative history of IGRA persuaded the court that Congress wanted to offer states the "unique opportunity to participate in the regulation of class III gaming on Indian lands," and the court hoped that mutual self-interest would motivate the State and the Tribes to negotiate. *Id.* at 1296-97. The court stated that "IGRA's terms do not force the State to enter into a compact, it only demands good faith negotiation. . . . " *Id.* at 1297. The court did not order the Governor to agree to a compact,

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[16] The Governor's offer of a "one size fits all" compact allowing only 250 video machines was unacceptable to the large *amici* Tribes. It simply would not allow them the "means of promoting tribal economic development, self-sufficiency, and strong tribal governments" that Congress sought to provide in adopting IGRA. *See* 25 U.S.C. § 2702. The smallest two tribes in Arizona average just 113 members, while the largest two average 91,229 members. Arizona Comm'n of Indian Affairs, *1993-1994 Tribal Directory of the 21 Federally Recognized Indian Tribes of Arizona* at p. v. (Arizona Comm'n of Indian Affairs, ed., Sept. 1993).

nor would the court penalize the State if the Governor refused to agree to a compact. The court simply ordered that,

> in the event a compact is not concluded within sixty days, the parties shall each submit on the sixtieth (60) day to a mediator appointed by the Court a proposed compact that represents their last best offer for a compact.

Id. at 1298.

At a later hearing, the court denied the Governor's motion for a stay pending appeal, holding that IGRA does not compel the Governor to enter into compacts with tribes but simply provides states the opportunity to become involved in regulating Indian gaming, if they so desire. If a state chose not to participate, according to the court, then the Secretary of Interior would promulgate procedures to regulate class III gaming on the affected reservation. *See* 25 U.S.C. § 2710(d)(7)(B)(vii). The district court held:

> Because this Court has determined that IGRA is not violative of the Tenth Amendment, because it does not coerce the state to do anything other than to have the opportunity to participate in Indian gaming on reservations, it does not appear to the Court that the motion for stay should be granted.
>
> . . . Congress has simply given the opportunity to the state to participate. . . .
>
> * * *
>
> . . . There is no coercion placed upon the state, only an opportunity to participate.

Yavapai-Prescott Indian Tribe v. Arizona, 796 F.Supp. 1292 (D.Ariz. 1992) (Hr'g. Tr. Dec. 4, 1992, at 18). Arizona appealed the district court's Order declaring a deadline for negotiations.[17]

The Mediation Process

Negotiations continued but Arizona and the Tribes were unable to agree to a compact during the sixty day period for negotiations. As a result, the court followed the IGRA remedial procedures and selected a former Chief Justice of the Arizona Supreme Court as IGRA mediator. *See* 25 U.S.C. § 2710(d)(7)(B)(iv). The Governor then submitted to the mediator his Last Best Offer and each of the *amici* Tribes submitted theirs. After all parties had ample opportunity to present evidence and briefs in support of their positions, the mediator selected the Tribes' Last Best Offers.[18] On February 22, 1993, the

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[17] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292 (D.Ariz.), *appeal filed*, No. 92-16954 (9th Cir. Oct. 27, 1992).

[18] In his decision, Chief Justice Gordon noted that one of the express objectives of Congress in passing IGRA was to provide a "means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. As a result of touring the Tohono O'odham Reservation with all parties during the mediation process, Chief Justice Gordon wrote:

> Although I have resided in Arizona all but six months of my life, and have seen living conditions on several Indian reservations in Arizona, I was shocked to see the substandard housing, medical and educational conditions that existed on the Tohono O'odham Reservation. The elderly, sick and disabled on that reservation live in conditions not unlike many third

mediator submitted the selected compacts to the State of Arizona pursuant to 25 U.S.C. § 2710(d)(7)(B)(v).[19]

As permitted under IGRA, after the Governor fully participated in the last best offer mediation, he chose not to agree to the compacts selected by the mediator. Therefore, the mediator so notified the Secretary of Interior, pursuant to the procedures established in IGRA, which thereby enabled the Secretary to prescribe procedures for class III gaming, in consultation with the Tribes. 25 U.S.C. § 2710(d)(7)(B)(vii).[20] The IGRA procedures were successfully completed and no coercive order had been entered against Arizona or its Governor by the district court.

At that point, though, the Governor and the Tribes, with the assistance of the Secretary of Interior, were able to finally reach agreement on terms for compacts. The Governor and the *amici* Tribes, together with approximately nine other Arizona tribes, then voluntarily entered into class III compacts under 25 U.S.C. § 2710(d)(3)(B). The compacts allow the State to monitor

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> world countries in Africa today. . . . These conditions would not be allowed to exist anywhere else in Arizona. Even counsel for the state in this matter did not dispute the dire economic needs of the tribes involved.

Yavapai-Prescott Indian Tribe v. Arizona, No. M-93-0001 (D.Ariz. Feb. 15, 1993), *reprinted in* 20 Indian Law Reporter 3081 (1993) (Decision reproduced at App. 11).

[19] *See* Letter of A. Deer, Asst. Sec. of Interior, to Chm. Listo, dated July 30, 1993, reproduced at App. 1.

[20] *See* Letter of A. Deer, Asst. Sec. of Interior, to Chm. Listo, dated July 30, 1993, reproduced at App. 1.

the regulation of gaming on Indian lands and require that tribes reimburse the State for all of its costs incurred under the compacts. The *amici* Tribes' compromise class III compacts were approved by the Secretary of Interior on July 30, 1993.[21] Ultimately, the IGRA remedial provisions worked in Arizona. IGRA produced compacts without judicial coercion.

The Compacts are Challenged in the Ninth Circuit

Soon after the Governor and the Tribes agreed to the class III compacts, Arizona moved to dismiss its appeal pending in the Ninth Circuit. *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292 (D.Ariz.), *appeal filed*, No. 92-16954 (9th Cir. Oct. 27, 1992). It was at that point that four Arizona off-reservation gambling operators (American Greyhound Racing, Inc., Western Greyhound Racing, Inc., Southern Arizona Greyhound Racing, Inc., and Tucson Greyhound Park, Inc.) moved to intervene in the appeal to oppose the voluntary dismissal. The dog tracks claimed that Indian gaming would adversely affect their gaming businesses and they wanted to pursue the Tenth Amendment challenge to the Arizona-Tribal compacts. Eventually, the Ninth Circuit dismissed Arizona's appeal.[22]

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[21] *See* 58 Fed.Reg. 44,000 (1993); 58 Fed.Reg. 44,002 (1993); 58 Fed.Reg. 44,010 (1993).

[22] *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. 1292 (D.Ariz. 1992), *appeal dismissed*, No. 92-16954 (9th Cir. Mar. 14, 1994).

The *amici* Tribes are concerned that if any part of IGRA is ruled violative of the Eleventh Amendment, their class III compacts, which have settled all tribal gaming disputes in Arizona, as well as other successful compacts, might again be subject to collateral challenge. In addition, these and most other compacts have a term of years. As a result, the Tribes may need to rely on the remedial provisions of IGRA again to resolve disputes that could arise during renewal negotiations.

ARGUMENT

The *Ex parte Young* Doctrine Applies and Permits the Suit Against the Governor of Florida to Invoke the IGRA Remedial Provisions

The Eleventh Amendment was adopted to prevent federal courts from entering judgments that must be paid out of state treasuries. As this Court recently held,

> [C]ourts of appeals have recognized the vulnerability of the state's purse as the most salient factor in Eleventh Amendment determinations . . . In sum . . . the vast majority of circuits . . . have concluded that the state treasury factor is the most important factor to be considered . . . and, in practice, have generally accorded this factor dispositive weight.

Hess v. Port Auth. Trans-Hudson Corp., ___ U.S. ___, 115 S.Ct. 394, 404 (1994).

If the Court concludes that Congress cannot waive a state's immunity through its adoption of IGRA, the Seminole Tribe can still obtain complete relief if the Governor

remains a defendant under *Ex parte Young*, 209 U.S. 123 (1908). The Eleventh Amendment does not prevent federal courts from prospectively compelling state officials to obey federal law, nor does it disable federal courts or Congress from fashioning prospective remedies to protect the federal statutory rights of a plaintiff. *Green v. Mansour*, 474 U.S. 64, 68 (1985).

The IGRA remedial provisions pose no threat to Florida's treasury and the State does not need to be a defendant in *Seminole*. The Eleventh Circuit misapplied *Ex parte Young* and ignored the limited role Congress gave to the federal courts under IGRA to set the clock for negotiations and to select a mediator, if necessary. First, the court below concluded that *Ex parte Young* was inapplicable because the conduct affected by IGRA involved official government duties. 11 F.3d at 1029. In addition, the court concluded, incorrectly, that *Ex parte Young* was inapplicable because under IGRA a state official is allowed to exercise discretion, namely, determining whether or not to negotiate a compact, negotiating a compact, and enforcing a compact. *Id.* at 1028.

The court was wrong on both counts. The fact is, all *Ex parte Young* cases involve official government duties. There is certainly no limitation on using the *Ex parte Young* doctrine to compel official conduct.[23] *Ex parte*

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[23] The *Ex parte Young* fiction that allows suits against state officers despite the Eleventh Amendment is not concerned with whether a state officer's conduct is "official," but whether the relief ordered by the court is in fact only prospective. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984); *Edelman v. Jordan*, 415 U.S. 651, 664-65, 667 (1974).

Young has allowed the enforcement of sweeping federal court injunctive relief requiring state officers to prospectively conform their official conduct to the legitimate mandates of federal law.[24]

The court of appeals also misapplied an *Ex parte Young* exception for discretionary acts.[25] The discretion available to a state under IGRA survives even if the remedial procedures of IGRA are invoked. The Act does *not* authorize the district court to require that the State of Florida agree to a compact. The Eleventh Circuit seemed to believe that the Governor or the State of Florida might be compelled by the district court to negotiate, sign, and perform under a compact. 11 F.3d at 1028. IGRA's remedies were carefully written to avoid this type of judicial interference with state affairs. *See Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. at 1297. The *amici* Tribes' experience in Arizona certainly demonstrates that a state's discretion to sign or not sign a compact – to get involved in the regulation of Indian gaming or not – remains with the state throughout the IGRA remedial process.

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[24] *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 88-89 (1989) (J. Brennan dissenting, discusses the *Ex parte Young* fiction and recognizes all such cases are in practical effect against the state).

[25] The law of injunction and mandamus is concerned with discretion in general. A court in equity will consider the scope of an officer's discretion to determine whether an applicant is entitled to an equitable remedy and to set the terms of the remedy. *Puerto Rico v. Branstad*, 483 U.S. 219, 227 (1987). An equity court's concern over discretionary duties is inapplicable when the court is administering a narrow, carefully prescribed, remedial process crafted by Congress.

While mandating "good faith negotiations", IGRA offers states an opportunity to become involved in tribal gaming. Provided they negotiate in good faith, states are given the *opportunity* to negotiate over both the scope and regulation of gaming in Indian country. This is precisely what the states sought when Congress was considering IGRA.[26] If a state chooses to opt out of the IGRA process, regulation of class III gaming will be resolved by the Secretary of Interior without state participation. IGRA gives that choice to state officials and the Act's judicial remedies do not empower the courts to take the state's options away. The court supervised remedy under IGRA is procedural only. IGRA provides a procedure to allow tribes to ultimately obtain a compact when class III gaming is authorized under federal law, either with a state or the Secretary. The fact that Congress has given states a voice in the regulation of Indian gaming – if they want it – does not violate the state's Eleventh Amendment rights.

The Eleventh Amendment analysis must look to the specific relief which a district court may grant. Under IGRA, the district court will not need to compel *any* state official to do *anything*. If the district court determines that a state has failed to negotiate or has negotiated in bad faith, the court merely announces a sixty-day period for the parties to conclude negotiations. 25 U.S.C. § 2710(d)(7)(B)(iii). This determination involves no coercive orders from the district court. There is no coercive

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[26] *See Statement of Senator D. Inouye, Chm., Select Comm. on Indian Affairs, Before the Oversight Hearing on the Implementation of the Indian Gaming Regulatory Act*, May 6, 1992, *reproduced* at App. 4.

order if state officials do not negotiate during the sixty days. If they choose to continue negotiations, they do not become obligated to sign a compact. However, if no compact is agreed to at the end of the sixty days, as occurred in Arizona, the court then appoints a mediator. 25 U.S.C. § 2710(d)(7)(B)(iv).

Similarly, the mediator has no coercive authority over either party during the mediation process. A state can choose either to submit a last best offer or not. If the state fails to make an offer, the mediator will choose the tribe's offer. In Arizona, the State elected to fully participate in the last best offer mediation process, but then chose not to accept the mediator's decision.[27] IGRA clearly leaves that choice to the state. As the Arizona district court noted, "If the State declines to accept the compact chosen by the mediator, that is the end of the matter insofar as state participation is concerned." *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F.Supp. at 1297. Neither the court nor the mediator may take any coercive action under IGRA against the state after the state chooses whether to accept the mediator's decision. Should the state refuse to accept the mediator's choice, under IGRA the mediator advises the Secretary of Interior and the Secretary then promulgates regulations, in lieu of a compact, that will define the

[27] As the Arizona Mediator observed, "under the Act, true mediation is not contemplated." *Yavapai-Prescott Indian Tribe v. Arizona*, No. M-93-0001 (D.Ariz. Feb. 15, 1993), App. 12. IGRA mediation is non-binding, last best offer arbitration. By participating, the state motivates the tribe to submit a more moderate last best offer or risk the mediator choosing the state's offer. However, the state can still reject the decision. The state gets the best of both worlds.

scope and regulation of gaming on that reservation. Federal regulation of tribal gaming is clearly a permissible outcome under federal law and also has no Eleventh Amendment implications. As happened in Arizona, however, even at that last step in the process, when the Secretary is considering gaming regulations for the tribe, the state and tribe can still voluntarily enter into compacts.

Properly applied, IGRA works and culminates in a compact, with regulations either consented to by the state or written by the Secretary and enforced by federal and tribal officials, without a district court ever having to order coercive relief against state officials.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals and allow the IGRA remedial procedures to go forward.

Respectfully submitted,

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APPENDIX

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[LOGO] [LOGO]

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

JUL 30 1993

Honorable Sylvester Listo
Chairman
Tohono O'odham Nation
P.O. Box 837
Sells, Arizona 85634

Dear Chairman Listo:

On June 29, 1993, we received the compact between the Tohono O'odham Nation (Nation) and the State of Arizona (State), dated June 24, 1993.

This compact has a unique history. In *Yavapai-Prescott v. Arizona*, No. 91-1696 (D. Az.), several Arizona tribes sued the State of Arizona for failing to negotiate, in good faith, Class III tribal-state gaming compacts. Thereafter, four tribes negotiated compacts with the State. Three tribes, the Tohono O'odham, White Mountain Apache and Pascua Yaqui, were unable to reach agreement with the State. As a result, the three tribes and the State were required to submit their last, best compact offers to a court-appointed mediator under 25 U.S.C. § 2710(d)(7) of the Indian Gaming Regulatory Act (IGRA). The mediator was required to choose the compacts which best comported with the terms of the IGRA. In all three instances, the mediator chose the tribes' compacts. The State, however, declined to consent to the proposed compacts.

Upon the expiration of the time period in which the State could accept the compacts, the mediator submitted the compacts to the Secretary to prescribe gaming procedures. Although the compacts chosen by the mediator were submitted to the Secretary, the three tribes and the Governor had agreed to continue their compact negotiations to resolve differences and to settle the pending lawsuit. The parties were able to reach agreements which resulted in negotiated compacts. The compacts were then submitted to the Department for approval in lieu of Secretarial procedures. We find nothing in the IGRA which precludes the State and Nation from concluding a compact and substituting it for the development of procedures.

We have completed our review of your Compact and conclude that it does not violate the IGRA, Federal law or our trust responsibility. Therefore, pursuant to my delegated authority and Section 11 of the IGRA, we approve the Compact. The Compact shall take effect when the notice of our approval, pursuant to Section 11 (d)(3)(b) of IGRA, 25 U.S.C. § 2710(d)(8)(D) is published in the FEDERAL REGISTER.

Notwithstanding our approval of the Compact, be advised that Section 11(d)(1) of the IGRA, 25 U.S.C. § 2710(b)(1)(B) requires that gaming cannot be conducted without a tribal gaming ordinance approved by the Chairman of the National Indian Gaming Commission (NIGC). On July 8, 1992, the NIGC published in the FEDERAL REGISTER proposed regulations to govern the approval of Class II and Class III gaming ordinances. The final regulations were published in the FEDERAL REGISTER on January 22, 1993 (58 Fed. Reg. 5802), and became

effective on February 22, 1993. Pursuant to the IGRA and the regulations, even previously existing gaming ordinances must be submitted to the NIGC for approval when requested by the Chairman.

In addition, if the Nation intends to enter into a management contract for the operation and management of the Nation's gaming facility, the contract must likewise be submitted to, and approved by the Chairman of the NIGC pursuant to Section 11(d)(9) of the IGRA, 25 U.S.C. § 2710(d)(9) and the NIGC's regulations governing management contracts. The Nation may want to contact the NIGC at (202) 632-7003 for further information on submitting the ordinance and the management contract for approval by the NIGC.

We wish the Nation and the State success in their economic venture.

Sincerely,

/s/ Ada E. Deer
Assistant Secretary –
Indian Affairs

Enclosures

STATEMENT OF SENATOR DANIEL K. INOUYE
CHAIRMAN, SELECT COMMITTEE ON INDIAN
AFFAIRS BEFORE THE MAY 6, 1992 OVERSIGHT
HEARING ON THE IMPLEMENTATION OF THE
INDIAN GAMING REGULATORY ACT

GOOD MORNING. OUR HEARING TODAY IS THE THIRD IN A SERIES OF THREE OVERSIGHT HEARINGS ON THE IMPLEMENTATION OF THE INDIAN GAMING REGULATORY ACT.

THE COMMITTEE'S FIRST HEARING ON THE IMPLEMENTATION OF THE ACT, HELD ON FEBRUARY 5TH OF THIS YEAR, FOCUSED UPON THE IMPLEMENTATION ACTIVITIES OF THE VARIOUS FEDERAL AGENCIES CHARGED WITH RESPONSIBILITIES UNDER THE ACT.

ON MARCH 18TH, THE COMMITTEE HELD A SECOND HEARING ON THE TRIBAL/STATE COMPACTING PROCESS. TODAY, WE ADDRESS THE ACTIONS THAT TRIBAL GOVERNMENTS HAVE TAKEN TO IMPLEMENT THE ACT, BOTH IN TERMS OF REGULATION AND LAW ENFORCEMENT.

WE ARE AT A VERY CRITICAL POINT IN THE HISTORY OF THE INDIAN GAMING LAW, AND IF I MAY, I WOULD LIKE TO TAKE A FEW MOMENTS TO DESCRIBE THIS CRISIS FROM MY POINT OF VIEW.

IT HAS BEEN SEVERAL YEARS NOW, SINCE I BEGAN THIS PROCESS, IN 1987, OF DEVELOPING THE GAMING LAW – AS CHAIRMAN OF THE SELECT COMMITTEE ON INDIAN AFFAIRS. AT THE TIME, WE WERE ALL AWARE OF WHY THIS EFFORT HAD TO BE UNDERTAKEN.

THE SUPREME COURT HAD JUST RULED IN THE *CABAZON* CASE, AND IF THE DECISION HAD BEEN IMPLEMENTED NATIONWIDE, THE RESULT WOULD HAVE BEEN CHAOTIC. THERE WOULD HAVE BEEN ALMOST NO CONTROL OR ADMINISTRATION OF GAMING ACTIVITIES IN THE VARIOUS JURISDICTIONS.

BECAUSE OF THE UNITED STATES' TRUST RELATIONSHIP WITH THE INDIAN NATIONS AND THE LONG-ESTABLISHED EXCLUSION OF STATE JURISDICTION IN INDIAN COUNTRY, WE FIRST EXAMINED THE POSSIBILITY OF A FEDERAL COMMISSION THAT WOULD BE RESPONSIBLE FOR THE REGULATION OF INDIAN GAMING, AS WELL AS ASSOCIATED LAW ENFORCEMENT RESPONSIBILITIES, WHICH WOULD BE SHARED WITH THE TRIBAL GOVERNMENTS.

FOR THE MOST PART, MANY OF THE INDIAN LEADERS WERE FAVORABLY INCLINED TO THIS PROPOSITION, BECAUSE IT WOULD ALLOW THE TRADITIONAL RELATIONSHIP OF THE FEDERAL GOVERNMENT TO INDIAN COUNTRY TO CONTINUE, AND THE GAMING ACTIVITIES WOULD BE THE RESULT OF A COMPACT BETWEEN THE UNITED STATES AND THE INDIAN GOVERNMENTS.

WHEN THIS WAS MADE KNOWN, THE SEVERAL STATES, ALMOST IN A CHORUS, CAME OUT WITH A RESOUNDING "NO!". THEY ARGUED THAT AFTER ALL, THESE ACTIVITIES WOULD BE TAKING PLACE WITHIN STATE BORDERS, AND THE STATES WANTED SOME ROLE TO PLAY IN THE DETERMINATION OF

WHAT GAMING ACTIVITIES WOULD BE CONDUCTED ON RESERVATION LANDS.

IT WAS THE STATES WHO ADVOCATED FOR A TRIBAL/STATE COMPACT PROVISION IN THE ACT. IT WAS THE STATES THAT WANTED THE "LEVEL PLAYING FIELD." IT WAS THE STATES THAT WANTED TO NEGOTIATE WITH THE INDIAN NATIONS ON A GOVERNMENT-TO-GOVERNMENT BASIS.

AND, IT WAS I, AS CHAIRMAN OF THE COMMITTEE, WHO WAS SADDLED WITH THE UNENVIABLE TASK OF URGING THE TRIBAL GOVERNMENTS, TO ACCEPT THIS FORMULATION. THE TRIBAL GOVERNMENTS DID NOT WANT THE TRIBAL/STATE COMPACTS. IT WAS THE STATES THAT WANTED THE COMPACTS.

SO WE SET UP THIS PROVISION OF THE LAW – THE TRIBAL/STATE COMPACT PROVISION – WHERE WE CALLED UPON THE INDIAN TRIBAL GOVERNMENTS TO SET ASIDE SOME OF THEIR SOVEREIGN RIGHTS IN RETURN FOR WHAT THEN APPEARED TO BE A RATIONAL SCHEME OF MANAGEMENT OF GAMING ACTIVITIES ON INDIAN LANDS.

IN EXCHANGE FOR GIVING UP SOME OF THEIR SOVEREIGN ACTIVITIES, WE WAIVED THE JOHNSON ACT WHEREVER A TRIBAL/STATE COMPACT WAS IN PLACE, AND WE PROVIDED THAT IF A STATE ALLOWED CLASS III GAMING FOR CHARITABLE PURPOSES, CLASS III GAMING COULD BE A SUBJECT OF COMPACT NEGOTIATIONS BETWEEN THE TRIBAL AND STATE GOVERNMENTS.

AND NOW IT IS THE STATES THAT SEEK TO AVOID THE COMPACTS, NOT THE TRIBAL GOVERNMENTS.

THIS IS JUST A BRIEF DESCRIPTION OF WHAT TRANSPIRED AT THE TIME OF THE ACTS CONSIDERATION IN THE CONGRESS.

TODAY, WE COME TO THIS IMPASSE. WE HAVE A STATE WHERE A COMPACT HAS BEEN REACHED BUT THE GOVERNOR REFUSES TO SIGN THE COMPACT AND THE GOVERNOR IS ASSERTING THE ELEVENTH AMENDMENT IMMUNITY TO SUIT BY THE TRIBAL GOVERNMENT WITH WHOM THE COMPACT WAS NEGOTIATED.

OTHER STATES HAVE ASSERTED THE ELEVENTH AMENDMENT AS A BAR TO ENGAGING IN NEGOTIATIONS FOR A TRIBAL/STATE COMPACT, AND THIS PRACTICE IS DAILY BECOMING MORE WIDESPREAD.

AS CHAIRMAN OF THE SELECT COMMITTEE ON INDIAN AFFAIRS AND THE PRIMARY SPONSOR OF THE INDIAN GAMING REGULATORY ACT, I AM CONSTANTLY BEING APPROACHED WITH REQUESTS TO OPEN UP THE ACT AND AMEND THE ACT – THESE REQUESTS COME MOSTLY FROM THE STATE GOVERNMENTS.

AND SO, GIVEN THE CURRENT STATE OF AFFAIRS, I WOULD ASK OF MY COLLEAGUES IN THE STATES THAT ARE CONCERNED ABOUT THIS ACT – WHAT I CONSIDER TO BE THE THRESHOLD QUESTIONS AT THIS STAGE –

IF THE STATES DON'T WANT A FEDERAL COMMISSION –

IF THE STATES DON'T WANT TRIBAL/STATE COMPACTS –

IF THE STATES DON'T WANT THE SECRETARY OF THE INTERIOR TO PRESCRIBE COMPACTS –

IF THE STATES DON'T WANT THE INTERIOR SECRETARY TO PRESCRIBE PROCEDURES FOR THE CONDUCT OF CLASS III GAMING ON INDIAN LANDS –

WHAT DO THE STATES WANT?

AS CHAIRMAN OF THIS COMMITTEE, AND AS ONE WHO IS SWORN TO UPHOLD THE LAWS OF THE UNITED STATES, THIS IS MY QUESTION AND THE PREDICAMENT I FACE.

DO WE ALL TAKE THE POSITION THAT *CABAZON* CONTROLS AND LET CHAOS PREVAIL?

TO ALLOW THE ISSUE OF INDIAN GAMING TO LINGER IN THIS IMPASSE IS NOT WORTHY OF THOSE OF US WHO BELIEVE OURSELVES TO BE LEADERS.

IT IS NOT FAIR TO THE INDIAN NATIONS.

SO I ASK, WHAT SAY YOU – STATES?

IF IT IS YOUR INTENTION TO MAKE A DEAD LETTER OF THE LAW – THE INDIAN GAMING ACT – THEN BY YOUR ACTIONS YOU WILL COMPEL OUR ACTION . . .

SHALL IT BE A FEDERAL COMMISSION? SHALL IT BE COMPACTS BETWEEN THE UNITED STATES

AND THE INDIAN NATIONS? SHALL WE LEAVE THIS ALL UP TO THE SECRETARY OF THE INTERIOR? OR DO YOU WANT SOME SAY IN WHAT GOES ON – AND IF SO, WHY DO YOU SEEK TO ELUDE THE VERY PROVISIONS OF THE LAW THAT YOU FOUGHT SO HARD TO SECURE?

IN THE COMING DAYS, I WILL BE CONTACTING THE GOVERNORS AND THE ATTORNEYS GENERAL OF THE CONCERNED STATES, AND I WILL BE ASKING THESE QUESTIONS OF THEM.

FOR THOSE OF US WHO ARE CHARGED WITH CARRYING OUT THE FEDERAL TRUST RELATIONSHIP, THIS IS A DILEMMA THAT DEMANDS IMMEDIATE RESOLUTION. THE REGULATIONS OF THE DEFINITIONS FOR CLASS II AND CLASS III GAMING WILL GO INTO EFFECT TOMORROW.

U.S. ATTORNEYS HAVE ADVISED THE COMMITTEE THAT THEY WILL PURSUE ENFORCEMENT OF THE ACT'S DEFINITIONS, AND IN THE MEANTIME, GIVEN THE ACTIONS OF THE SEVERAL STATES, THE TRIBAL GOVERNMENTS HAVE NO MEANS OF SECURING A COMPACT THAT WOULD PRE-EMPT THE APPLICATION OF THE JOHNSON ACT AND THE ENFORCEMENT OF THAT ACT.

THIS IS UNFAIR TO THE INDIAN NATIONS, AND I FOR ONE, CHARGED WITH THE DUTIES OF THE SUPREME TRUSTEE, WILL NOT ALLOW THIS SITUATION TO CONTINUE. I WILL LOOK FOR A RESPONSE, BUT I WILL ALSO TAKE ACTION.

I WILL NOT ASK THE TRIBAL GOVERNMENTS TO WAIT FOR SIX MONTHS OR A YEAR – I WILL NOT ASK THE INDIAN NATIONS TO FOREGO THE LIMITED ECONOMIC OPPORTUNITIES THAT GAMING OPERATIONS AFFORD TO THEM, FOR THE SEVERAL YEARS THAT IT MAY TAKE TO APPEAL THESE ELEVENTH AMENDMENT CASES TO THE SUPREME COURT.

I WILL CALL UPON THE LEADERS OF STATE AND TRIBAL GOVERNMENTS TO WORK WITH ME TO EFFECT A RESOLUTION NOW.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

YAVAPAI-PRESCOTT INDIAN TRIBE, et al.
v. ARIZONA, et al.

No. M 93-00001 PHX (D. Ariz., Feb. 15, 1993)

Summary

The district court-appointed mediator selects the proposed tribal-state gaming compacts of the White Mountain Apache Tribe, the Pascua Yaqui Tribe and the Tohono O'odham Nation pursuant to the provisions of the Indian Gaming Regulatory Act.

Full Text

Before GORDON, Mediator

GORDON, Mediator

Mediator's Selection of Proposed Gaming Compacts

Preface

Pursuant to this court's order dated December 16, 1992, the undersigned undertook his obligations as mediator pursuant to 25 U.S.C.S. § 2710, one of the provisions of an act of Congress popularly known as the Indian Gaming Regulatory Act, appearing generally as 25 U.S.C.S. § 2701 *et seq.* In obedience to the same order of this court, the White Mountain Apache Tribe, the Pascua Yaqui Tribe and the Tohono O'Odham Nation each on December 18, 1992, presented to the mediator, its last best offer for a gaming compact with the state of Arizona, and the state of Arizona simultaneously and on the same date

submitted to the mediator its last best offers for gaming compacts with each of said Indian tribes, copies of each having been filed with this court. Since that time, the parties have submitted a great deal of information to the mediator in the forms of reports, affidavits, briefs, memoranda, and excerpts from some pleadings filed in this matter. In addition, the mediator spent five days in on-site visits to the reservations of the plaintiff/intervenors viewing portions of the reservations, meeting with tribal officials, and with city, county and state officials from communities in or near the reservations in order to obtain information concerning the impact of each of the proposed gaming compacts. In addition, I interviewed many witnesses, expert and otherwise, offered by both sides, concerning gaming in Arizona, both tribal and non-Indian, as it existed in the past, as it exists presently, and their predictions as to what the effects would be in each of the scenarios represented by the offers of compacts of each party. The parties have also submitted to me information concerning tribal gambling in states other than Arizona where such gambling has been in effect since Congress adopted the Indian Gaming Regulatory Act. In addition, the parties have cited me to several federal court decisions interpreting the meaning and scope of that Act.

The role of the mediator, in general, under the Indian Gaming Regulatory Act is made difficult by the fact that the Act itself is both vague and incomplete in many respects regarding the types and scope of class III gaming required to be negotiated between the state and the tribes. Further, under the Act, true mediation is not contemplated: the mediator is forced to choose one of two

competing compacts in its entirety. He may not pick and choose the more acceptable portions of each and meld them together into a compact more acceptable to each party or to suggest concessions to be made. Further, apparently Judge Rosenblatt, in an abundance of caution to avoid violation of the state of Arizona's rights under the tenth amendment to the United States Constitution, purposely avoided determining the specific types of class III gaming required to be negotiated between the state and the tribes. Therefore, the mediator finds himself in the position of being required to do just that in making his choice of the compacts submitted.

Selection of Compacts

After having considered all of the matter submitted by the parties, in my role as mediator under the Indian Gaming Regulatory Act, I hereby select the following compacts from those submitted to me:

1. As between the last best offer compacts of the state of Arizona and the White Mountain Apache Tribe, I select the compact proposed by the White Mountain Apache Tribe as being that which best comports with the terms of the Indian Gaming Regulatory Act, other applicable federal law and the findings and order of the court. As a consequence, I reject the proposed compact of the state of Arizona.

2. As between the last best offer compacts of the state of Arizona and the Pascua Yaqui Indian Tribe, I select the compact proposed by the Pascua Yaqui Indian Tribe as being that which best comports with the terms of

the Indian Gaming Regulatory Act, other applicable federal law and the findings and order of the court. As a consequence, I reject the proposed compact of the state of Arizona.

3. As between the last best offer compacts of the state of Arizona and the Tohono O'Odham Nation, I select the compact proposed by the Tohono O'Odham Nation as being that which best comports with the terms of the Indian Gaming Regulatory Act, other applicable federal law and the findings and order of the court. As a consequence, I reject the proposed compact of the state of Arizona.

Reasoning Underlying Selections

Although it is not required under the Act, I feel it important for the parties, the court, and the public to be aware of the reasons I selected the compacts submitted by the Indian tribes rather than those of the state. Perhaps those reasons will be of interest to the Secretary of the Interior in the event the state refuses to accept the selected compacts.

My first concern as mediator was to discover why Congress passed the Indian Gaming Regulatory Act in the first place. Its reasons are succinctly stated at the very beginning of the Act:

#2702 Declaration of Policy

The purpose of this Act is –

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means

of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influence, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and the players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

Oct. 17, 1988, P.L. 100-497 #3, 102 Stat. 2467.

It is obvious that this Act was intended to give America's Indian tribes a source of revenue not previously available to them to somehow compensate for the generations of neglect that both state and federal governments have allowed to occur to reservation Indians. It seems to me that those who drafted the Act's declaration of policy must have had in mind the difficult situation in which many Indian tribes find themselves today, especially the tribes involved in this case. For whatever reasons, neither the state nor the federal government has furnished adequate revenue to provide for the needs of these tribes in areas of health, education, economic development, or governmental infrastructure. Also, the tribes, though varying in degree between them, lack tax bases and natural resources to generate returns sufficient to provide

those necessities. Each of the tribes involved has unemployment rates several times that of Arizona as a whole. Indians on these reservations have exceptionally high rates of alcoholism, drug abuse, school dropouts, teen suicides and pregnancies and adult suicides. The rate of functional illiteracy among tribal members in each of the tribes involved greatly exceeds the rate in the rest of Arizona. In all three tribes, depression and feelings of hopelessness prevail. Their leaders see no light at the end of the tunnel: no hope that things will change and get better. None of the tribes would favor gambling as its primary resource if other sources of revenue were available. Yet the tribes see the opportunities under the Indian Gaming Regulatory Act as being the only ones left to them which will provide a "jump start," to give them the money: to provide a higher level of quality education to their young and old so they can compete in the Anglo economic world; to preserve their cultures; and to fulfil the most basic needs of housing and health care to their people.

Although I have resided in Arizona all but six months of my life, and have seen living conditions on several Indian reservations in Arizona, I was shocked to see the substandard housing, medical and educational conditions that existed on the Tohono O'Odham Reservation. The elderly, sick and disabled on that reservation live in conditions not unlike many third world countries in Africa today. To a lesser degree, many of the conditions I observed on the Tohono O'Odham Reservation exist on the other two reservations. The White Mountain Apache tribal courts cannot function because of lack of courtroom space. That tribe also has no juvenile detention facility,

and it must house juvenile offenders in the same facility with adults. These conditions would not be allowed to exist anywhere else in Arizona. Even counsel for the state in this matter did not dispute the dire economic needs of the tribes involved.

The tribes' economic needs no longer being in doubt, my main task as mediator was to decide which of the submitted compacts, the state's or the tribe's, "best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court" as required by the Act.

By the terms of 25 U.S.C.S. [sic] § 2710(d)(1), class III gaming activities shall be lawful on Indian lands only if such activities are:

> (B) located in a State that permits such gaming for any purpose by any person, organization or entity, and
>
> (C) conducted in conformance with Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.
>
> . . . .

Paraphrasing section 2703 of the Indian Gaming Regulatory Act, class I gaming is defined as meaning social or traditional games usually engaged in by Indians for prizes of minimal value and in connection with ceremonies. Class II gaming includes bingo, pull tabs, lotto, punch boards, tip jars, instant bingo, and card games that are allowed by the state. Banking card games, including baccarat, chemin de fer, blackjack, electronic facsimiles of any game of chance, and slot machines are specifically

excluded from class II gaming. Class III gaming, the primary one in contention in this case, is defined as "all forms of gaming that are not Class I gaming or Class II gaming."

By inference all banking card games and the machines in question here are included within class III, as well as a lottery, and parimutuel wagering on dog or horse races.

The main differences between the compact offers of the state and the tribes is in the number of the machines to be allowed, and whether dice and card table games will be permitted.

The state of Arizona takes the position that the Indian tribes in Arizona should not be allowed to operate any type of gaming operation on their reservations that it has not permitted to be operated off the reservations. Although willing to allow a limited number of video gaming machines, Arizona would not allow the Indians to operate table games such as dice, poker or blackjack operated by live dealers. The tribes seek not only to have a larger amount of machines, but would have table games as well.

It is undisputed that several types of gaming defined as class III gaming under the Indian Gaming Regulatory Act are being operated in Arizona. The state of Arizona itself has raised over 1.5 billion dollars in revenue through its statewide lottery and related instant games since the lottery was adopted in Arizona in 1981. Currently several lottery drawings occur each week. The state of Arizona spends in excess of eight million dollars a year to advertise its lottery games and to encourage the

public to buy tickets. Television, radio and newspapers in Arizona are replete with advertisements to induce Arizonans and visitors to gamble in the state's games. Some of the state's instant games provided by the state are scratch cards which pay the player if he or she ends up with winning combinations of symbols identical with those used in mechanical or electronic slot machines. Other instant games provide likenesses of playing cards, which pay the player if combinations are obtained which would be winning hands at poker or blackjack. Lotteries and slot machines, whether mechanical or electronic, are class III gaming devices under the Act.

Arizona allows parimutuel wagering in both horse and dog tracks in the state, and has recently authorized off-track betting in sports bars and other establishments statewide. The state regulates the industry and receives substantial revenue from taxes generated from its operation.

Social, as opposed to commercial gambling, is permitted in Arizona, without regulation. Also, the manufacture, sale and possession of slot machines are permitted in Arizona, without regulation.

Charity "Las Vegas Nights" or "Casino Nights" are permitted in Arizona, without regulation. In such events non-profit organizations can raise funds for charitable purposes by providing full-scale casino type gambling to its patrons, including blackjack, poker, dice, roulette, and slot machines. Although reliable statistics were not available on short notice at the request of the mediator, the evidence presented showed that the occurrence of such charitable casino nights was frequent and statewide.

A description of the state of gambling in Arizona is given in this case by Professor William M. Thompson, of Las Vegas, Nevada, an expert in the field of gambling:

> Gambling in Arizona is permitted and consistent with the public policy of the State of Arizona. A wide range of gaming activities occur within the state. Arizona permits more forms of gaming than any other state in the southwest, with the exception of Nevada. Arizona permits charity casino nights, bingo, pull tabs, instant lottery, lotto; dog racing, harness racing, quarter horse racing, thoroughbred racing, both interstate and intrastate betting, off-track betting, tele-theatre betting, as well as the retail sale of slot and video machines. Clearly, Arizona is a gambling state. In Arizona gambling activity – including casino games – is permitted. The permitted forms of gambling activity in Arizona are almost identical to those permitted in California with these exceptions: Arizona has dog race betting which California does not, and California has commercial card rooms which Arizona does not. California permits the sale of antique machines only, whereas modern video and slot type machines are readily available and widely sold in Arizona; and California does not permit charity casino nights. In the famous *Cabazon* case, the United States Supreme Court determined that the gaming policy of California was civil and permissive in nature and not criminal or prohibitory in nature. Virtually all of the forms of gambling permitted in California are also played in Arizona. Like California, the State of Arizona receives considerable tax revenue from gaming activity conducted in the state. Arizona state lottery revenues rank 16th highest in the United States and state income (from) gambling exceeds one-third of the amount the State of Nevada realizes from taxation of gambiing operations.

Arizona has long since passed the time when it prohibited gambling. It now not only allows it, but encourages it, in a great many forms. Arizona relies on gambling to a great extent in raising revenue to avoid higher taxation on its residents. In my opinion none of the types of class III gambling being sought by the tribes now violates public policy in Arizona. The types of gaming sought in the tribes' compact should be included within those negotiated in gaming compacts with Indian tribes in Arizona. It seems cruel to allow non-Indian charities in Arizona to use casino gambling to raise substantial sums of money for such purposes as: providing scholarships for educational needs; raising money for medical services and supplies for the sick, the elderly and the disabled, and yet to deny the Indian tribes in Arizona that same opportunity for the very same purposes.

I do not base my opinion that class III gaming already is the public policy of Arizona merely on the allowance of charity casino nights alone, however. Permitting horse and dog racing and parimutuel betting on those events took Arizona on the first step into class III gaming. Then the biggest step was taken when the voters of Arizona decided that Arizona should run a state-sponsored lottery. It was made clear then that the citizens of Arizona wanted class III gambling. I also feel that there is no principled difference between the state's own instant type of blackjack played on Arizona's scratch game and the situation where a person sits across the table and

receives cards from a live dealer. The same logic applies to video machines which display symbols of playing cards. To me, both are the same as the live dealer table games, except perhaps in speed of play. All of the above are class III gaming under the Indian Gaming Regulatory Act, and are permitted in Arizona. Therefore, comparable games should be negotiable within a proposed gaming compact with Indian tribes.

As to the question of the great discrepancy between the offered compacts in the number of machines, the state's offers of 250 video machines to each of the tribes herein displays an apparent lack of regard for the significant differences in the various tribes' population, demography, geography, and economic and social needs. For the small tribes with which the state has already compacted, this limitation may be justified, as the income thereunder may indeed be satisfactory to them. However the needs of the tribes involved in this action are so much greater that it makes the state's "one-size-fits-all" offer seem arbitrary.

I am unimpressed with the state's argument that the greater number of machines requested by the tribes herein, phased in over the periods requested, would overwhelm the state's ability to investigate and certify the persons and machines involved. This argument is belied by the fact that the tribes compacts offer to pay all reasonable costs for the state's assistance. If Arizona does not have enough investigative personnel to handle the increase in work, the tribes' offers would cover the costs of the additional hires. Further, as prescribed in the

Indian Gaming Regulatory Act, the primary responsibility for regulation of the Indian gaming and enforcement of the laws is directed to fall on the tribes, the U.S. Justice Department, the National Indian Gaming Commission and the Interior Department. Although the National Indian Gaming Commission seems to be slow to gear up to its responsibilities, it is to be assumed that all these departments of the U.S. government will indeed fulfill their legal obligations under the Act.

In conclusion, I would state that my selection of compacts in this case is based on the state and federal law as it exists today. Things might be different if Arizona would hereafter legislatively abolish all class III gaming, or if Congress were to amend the Indian Gaming Regulatory Act to preclude the tribes offers under the Arizona circumstances. However, speculating as to what would happen if those things or either of them occurred is not within my responsibilities as mediator. Those are matters of public policy, best arrived at by either the Arizona Legislature or the U.S. Congress. However, I hope that any such legislative changes will not be sought in a spirit of retaliation against the tribes, or without first providing Indian tribes with adequate means to address the serious problems I have referred to above.

Copies of this selection of compacts will be faxed today to counsel for all parties, as this date is a federal holiday and the office of the clerk of the U.S. district court is not open to receive it to be filed. My selection will be considered made today, however, and submitted to the state on this date, in order to comply with the court's order to have the selection made by February 15, 1993. A copy will be hand delivered to the clerk of the

U.S. district court tomorrow, February 16, 1993, and copies formally will be mailed to the parties on the same date.

[*reprinted in* 20 Indian Law Reporter 3081 (1993)]

No. 94-12

(15)

FILED
MAR 31 1995

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SEMINOLE TRIBE OF FLORIDA,
Petitioner,
v.
STATE OF FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE POARCH BAND OF CREEK INDIANS AND PONCA TRIBE OF OKLAHOMA IN SUPPORT OF PETITIONER

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March 1995

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

No. 94-12

SEMINOLE TRIBE OF FLORIDA,
Petitioner,
v.
STATE OF FLORIDA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE POARCH BAND OF CREEK INDIANS AND PONCA TRIBE OF OKLAHOMA IN SUPPORT OF PETITIONER

INTEREST OF *AMICI*

The Poarch Band of Creek Indians, a federally recognized tribe, has a cross-petition (No. 94-189) pending in this Court that raises identical issues, and arises from the same Court of Appeals ruling, as this case. *See Poarch Band of Creek Indians v. Alabama*, 776 F. Supp. 550 (S.D. Ala. 1991) and 784 F. Supp. 1549 (S.D. Ala. 1992), *aff'd, Seminole Tribe of Florida v. Florida*, 11 F.3d 1016 (11th Cir. 1994). The Ponca Tribe of Oklahoma, a federally recognized tribe, is respondent in an action (No. 94-1029) pending in this Court, which also raises the same Eleventh Amendment issue presented here. *See Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422 (10th Cir. 1994).

Amici have been seeking to negotiate compacts with their respective states to permit Class III gaming in accordance with the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* This case will determine whether the Tribes' efforts will continue to be blocked—contrary to the clear intent of Congress—by the States' and Governors' claims of immunity from suit.[1]

SUMMARY OF ARGUMENT

This is an action by an Indian Tribe seeking compliance by a State and its Governor with the requirement of the Indian Gaming Regulatory Act ("IGRA")[2] that they negotiate in "good faith" regarding the Tribe's request to undertake gaming. 25 U.S.C. § 2710(d)(7)(A)(i). This case does not involve monetary or other retroactive relief. Only declaratory and prospective injunctive relief are sought. This case does not involve the exercise of Congressional power in derogation of the regulatory authority of states. On the contrary, IGRA provides states with a *greater* potential role in regulating Indian gaming than would be permissible absent IGRA, under this Court's ruling in *California v. Cabazon Band of Indians,* 480 U.S. 202 (1987). And this case does not involve a statute where Congress' intent to provide a cause of action against a state is in doubt. Congress in IGRA expressly provided for suits against states regarding the requirement of "good faith" negotiations.

The issue in this case is whether—notwithstanding the limited relief sought, the lack of intrusiveness into state authority, the breadth of Congressional power over Indian affairs, and the clear intent of Congress to permit such suits—the Governor and the State are immune from this suit under the Eleventh Amendment. As against

[1] This brief is filed with the written consent of the parties, filed with the Clerk of this Court.

[2] Pub. L. No. 100-497, 102 Stat. 2467, 25 U.S.C. §§ 2701 *et seq.*

the Governor, this action for prospective injunctive and declaratory relief, regarding a violation of federal law, is permissible under *Ex parte Young,* 209 U.S. 123 (1908). As against the State, the Eleventh Amendment is not a bar because Congress—acting pursuant to its plenary power over Indian affairs—expressly provided for such a suit against the State. At least in the narrow context of this case—where the only relief sought is prospective injunctive and declaratory relief, and where the federal statute enhances rather than diminishes state authority—Congress has the power to provide for such a suit.

STATEMENT

A. The *Cabazon* Case

In *California v. Cabazon Band of Indians,* 480 U.S. 202 (1987), this Court upheld the right of Indian tribes to undertake gaming activities on their reservations free from state regulation, where state law and public policy fail to prohibit such gaming by others. The Court held that while "state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided," no federal law permitted the application of California's laws to on-reservation gaming by tribes. *Id.* at 207, 212, 214. In addition, "in light of the compelling federal and tribal interests" in Indian gaming, most notably the " 'overriding goal' of encouraging tribal self-sufficiency and economic development", the Court refused to permit state regulation of Indian gaming in the absence of federal statutory authorization. *Id.* at 216, 221.

Cabazon made clear that gaming by tribes—like other aspects of Indian affairs—is fundamentally the province of federal law. As the Court noted, " 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.' " *Id.* at 207 (quoting *Washington v. Confederated Tribes of the Colville Reservation,* 447 U.S. 134, 154 (1980)).

B. The Indian Gaming Regulatory Act

Congress responded to the *Cabazon* decision by enacting the 1988 Indian Gaming Regulatory Act,[3] a comprehensive regulatory measure regarding Indian gaming. In IGRA, Congress reaffirmed the important federal interests underlying Indian gaming, including the need to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).[4] At the same time, Congress provided in IGRA a mechanism for state regulatory involvement in Indian gaming—altering, to that extent, the impact of this Court's ruling in *Cabazon*.

IGRA divides gaming into three categories.[5] Class III gaming—essentially gaming other than traditional Indian games, bingo and bingo related games—was the subject of a protracted struggle in Congress, beginning some years before *Cabazon*.[6] Tribes sought to remain free from state jurisdiction over their on-reservation activity, including gaming—a position that was ultimately buttressed by this Court's decision in *Cabazon*.[7] On the

[3] 25 U.S.C. §§ 2701 *et seq.*

[4] IGRA was enacted in the context of the recognized failure of federal policy to provide other meaningful economic development opportunities in Indian country. *See* S. Rep. No. 446, 100th Cong., 2d Sess. 34 (1988) (hereafter "S. Rep.") (Additional views of Mr. McCain).

[5] Class I gaming includes traditional forms of Indian gaming such as "social games solely for prizes of minimal value. . . ." 25 U.S.C. § 2703(6). Class II gaming includes bingo and related games such as pull-tabs, punch boards, lotto, tip jars, instant bingo and "other games similar to bingo. . . ." 25 U.S.C. § 2703(7)(A)(i)(III). Class III gaming is all gaming not Class I or Class II, and includes, for instance, casino gaming, slot machines and certain forms of card gaming. 25 U.S.C. § 2703(8).

[6] *See* S. Rep. at 1-5.

[7] *See* S. Rep. at 5.

other hand, certain states sought to control Indian gaming within their borders. *See* S. Rep. at 4-6, 33. After considering these sharply contrasting views on this issue for 6 years, Congress arrived at a "delicately balanced compromise",[8] and enacted IGRA.

The "core compromise"[9] was the provision of IGRA permitting Class III gaming if, *inter alia*, such gaming is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . ." 25 U.S.C. § 2710(d)(1)(C). This compacting language provided states with an opportunity to negotiate with tribes regarding the terms under which Class III gaming may be conducted on Indian lands. While IGRA provided a list of certain topics that may be included within a compact, it did not determine how any issue should be resolved. 25 U.S.C. § 2710(d)(3)(C). The thrust of the compact provision in IGRA was that tribes and states should come to an agreement regarding how to structure Class III gaming, consistent with the interests of each.

Congress, in enacting IGRA with this compacting process, remained concerned that states not abuse the process by unreasonably refusing to enter compact negotiations, or by unreasonably refusing to agree to compact terms.[10] Accordingly, Congress provided that if a state fails to negotiate at all, or fails to negotiate in good faith the federal district courts shall have jurisdiction over

[8] 134 Cong. Rec. 25377 (daily ed. Sept. 26, 1988) (remarks of Cong. Udall) (Chairman of the House Interior and Insular Affairs Committee and primary House sponsor).

[9] 134 Cong. Rec. 25376 (daily ed. Sept. 26, 1988) (remarks of Cong. Udall).

[10] As the Senate Report on the bill which became IGRA noted:

> It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming. . .

S. Rep. at 13.

> any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith.

25 U.S.C. § 2710(d)(7)(A)(i). Congress placed the burden of proof on the state in such an action to justify its position, and "to prove that the State has negotiated with the Indian tribe in good faith. . . ." 25 U.S.C. § 2710(d)(7)(B)(ii).

If a state fails to meet its burden of demonstrating that it negotiated in good faith, IGRA prescribes a remedy designed to provide additional opportunities for the state and tribe to arrive at a mutually agreeable compact. First, the federal district court can order the parties to conclude a compact within 60 days—essentially ordering good faith negotiations for that period. 25 U.S.C. § 2710(d)(7)(B)(iii). If no compact is reached, the court then appoints a mediator who considers the "last best offer" for a compact by each side, and selects one. 25 U.S.C. § 2710(d)(7)(B)(iv). The state may accept the mediator's selection, 25 U.S.C. § 2710(d)(7)(B)(ii), or failing that, the mediator notifies the Secretary of Interior, who then prescribes federal procedures, consistent with the mediator's recommendation and the provisions of IGRA, for the conduct of Class III gaming on the tribe's reservation. 25 U.S.C. § 2710(d)(7)(B)(vii).

In short, the compromise of IGRA was to *expand* the potential role of the states in the regulation of Indian gaming through the compacting process. The price to the states of this enhanced participation in Indian gaming was not onerous. The states were required merely to negotiate "in good faith". Tribes, on the other hand, were deprived by IGRA of their right—upheld in *Cabazon*—to undertake gaming opportunities free from state law. In return, tribes obtained a mechanism for addressing unfair treatment by states—the right to seek

prospective relief to require states to comply with their obligation to negotiate in good faith. Unless the federal courts are available to enforce the states' obligation to negotiate in good faith, the "delicately balanced compromise" of IGRA will be unraveled.

ARGUMENT

I. INTRODUCTION

The Eleventh Amendment "implicates the fundamental constitutional balance between the Federal Government and the States." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). In accordance with the "principles of federalism that inform [the] Eleventh Amendment", *Hutto v. Finney*, 437 U.S. 678, 691 (1978), the Court has recognized that this balance between the federal government and the states encompasses a number of exceptions to state immunity from suit.

The Eleventh Amendment does not bar a suit against a state if the state "has consented to suit, either expressly or in the 'plan of the convention.'" *Blatchford v. Native Village of Noatak*, 501 U.S. ——, 115 L.Ed.2d 686, 694 (1991); *Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934). Thus, the Eleventh Amendment does not bar suits in federal court by the United States against a state, or by one state against another. *United States v. Texas*, 143 U.S. 621, 644-54 (1892); *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904). Permitting the federal courts to resolve such disputes was deemed necessary to protect particular aspects of the Constitutional plan.[11]

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[11] *See Monaco v. Mississippi*, 292 U.S. at 328 (provision of Constitution authorizing suit by state against another state "necessarily operates regardless of the consent of the defendant state"); *United States v. Texas*, 143 U.S. at 644 ("permanence of the Union might be endangered" if suits by U.S. against states were barred).

Likewise, the Eleventh Amendment does not bar a suit against a state where Congress, acting under a plenary Constitutional grant of power, expressly provides a federal cause of action against a state. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456-57 (1976); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13-23 (1989). By agreeing to a Constitutional provision that affords such plenary power to Congress—and correspondingly limits state power—the states "relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable." *Id.* at 20. Without the power to provide for suits against states in these instances, "the congressional power thus conferred would be incomplete. . . ." *Id.* at 19.

Finally, the Eleventh Amendment does not bar actions against state officials for prospective injunctive relief regarding violations of federal law. *Ex parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974). Such actions are necessary "to end a continuing violation of federal law . . . [and] to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1985).

As these cases reflect, there is often tension between the state interest in immunity from suit on the one hand, and the federal interest in the vitality of certain Constitutional provisions, most notably the Supremacy Clause, on the other. When this occurs, the Court has found a "need to reconcile competing interests"—that is, to resolve the conflict between the state interest in immunity from suit and the other Constitutional interests that are implicated by a particular assertion of state immunity. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). The Court has reconciled these competing interests by construing the Eleventh Amendment to accommodate other fundamental Constitutional interests. Thus, the exceptions to the immunity provided by the Eleventh Amendment are a mechanism

by which this Court "give[s] life to" fundamental principles of the Constitution that would otherwise be jeopardized by the Eleventh Amendment. *Green*, 474 U.S. at 68.

This case involves the application of two exceptions to the Eleventh Amendment. First, the doctrine of *Ex parte Young* provides that actions for prospective injunctive relief against state officials regarding violations of federal law are permissible. This is such an action, against the Governor. Second, Congress has specifically provided for this suit against the State under IGRA—enacted under its broad authority over Indian affairs. For essentially the same reasons that *Ex parte Young* permits actions for prospective relief to protect the supremacy of federal law, Congress has the authority to provide for this action for prospective relief to vindicate IGRA's requirement that the state negotiate in "good faith."

II. THIS ACTION AGAINST THE GOVERNOR IS PERMISSIBLE UNDER THE DOCTRINE OF *EX PARTE YOUNG*, 209 U.S. 123 (1908)

This case involves only a claim for prospective injunctive relief and related declaratory relief. The Seminole Tribe seeks to have the defendants conform their future conduct to the requirement of IGRA that, upon receipt of a request by a tribe for a gaming compact, they "negotiate with the Indian tribe in good faith to enter into such compact." 25 U.S.C. § 2710(d)(3)(A). No money damages or other retroactive relief is sought. Accordingly, as against the Governor, this action is permissible under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

Suits against state officials seeking prospective injunctive and declaratory relief regarding violations of federal law are not barred by the Eleventh Amendment. As this Court has stated, "[i]n an injunctive or declaratory action grounded on federal law, the State's immunity *can*

be overcome by naming state officials as defendants." *Kentucky v. Graham*, 473 U.S. 159, 169 n.18 (1985) (emphasis in original). This "important exception" to the Eleventh Amendment was recognized in *Ex parte Young*, 209 U.S. 123 (1908), in which this Court held that "a suit challenging the constitutionality of a state official's action is not one against the State." *Pennhurst*, 465 U.S. at 102. While *Ex parte Young* involved a claimed violation of the Fourteenth Amendment by a state official, this Court has recognized that the doctrine encompasses other violations of federal law as well. *E.g., Edelman*, 415 U.S. at 676-77. Thus, "the Eleventh Amendment does not prevent federal courts from granting prospective injunctive relief to prevent a continuing violation of federal law." *Green*, 474 U.S. at 68. As this Court has emphasized:

> the availability of prospective relief of the sort awarded in Ex parte Young gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law.

Id.[12] The remedy sought by the Tribe here—an order requiring the Governor to stop violating IGRA's directive regarding good faith negotiations—is precisely the kind permitted under *Ex parte Young*.

The Court of Appeals—while not suggesting that this action involves anything but prospective injunctive relief regarding a claimed violation of federal law—nevertheless rejected the application of the *Ex parte Young* doctrine. The Court of Appeals contended first that "the *Ex parte Young* doctrine cannot compel discretionary acts." *Seminole*, 11 F.3d at 1028. But, as the Court noted in *Ex parte Young*, "[a]n injunction to prevent him [a state officer] from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Ex parte Young*, 209 U.S. at 159.

[12] This Court has also articulated limits to the doctrine of *Ex parte Young*. The doctrine does not apply to claims for monetary or other retroactive relief, *Edelman*, 415 U.S. at 678, to cases involving no claim of continuing violation of federal law, *Green*, 474 U.S. at 71, 73, or to claims arising under state law, *Pennhurst*, 465 U.S. at 106. This case, seeking prospective injunctive relief regarding an ongoing violation of federal law, is not subject to any of these limitations.

This action seeks to require the Governor to fulfill the statutory mandate of IGRA that, in response to a tribal request he "*shall* negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710 (d)(3)(A) (emphasis added). The plain language of IGRA imposes a duty to negotiate in good faith, if a state wants to have a role in determining the terms under which Indian gaming may take place. Thus, where a Governor participates in compact negotiations—as he did here—IGRA provides that he must negotiate in good faith as a matter of federal law. While IGRA permits the broad exercise of authority by the Governor in determining the terms of a compact, it does not permit him to refuse to negotiate in good faith.[13] The Court of Appeals was simply wrong in characterizing this action as one to compel the exercise of discretion by the Governor.[14]

[13] This Court has recognized that the obligation to "confer in good faith" as defined in section 8(d) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(d), creates a "duty on the parties", notwithstanding the wide discretion afforded to the parties with respect to terms of a "collective bargaining agreement." *N.L.R.B. v. Ins. Agents' Int'l*, 361 U.S. 477, 487-88 (1960). An employer's obligation to confer in good faith under the NLRA is mandatory, not discretionary. The obligation to negotiate in good faith under IGRA—for a state that enters negotiations—should be construed in a like manner.

[14] IGRA provides that if a federal court determines that a state has failed to meet its statutory obligation to negotiate in good faith, the remedy is a series of procedures designed to provide additional opportunities for the parties to reach an agreement, without compelling any action by the state or its officers. 25 U.S.C. § 2710(d)(7)(B)(iii), (iv), (vi), (vii). These procedures do not

The Court of Appeals contended also that the doctrine of *Ex parte Young* does not apply because the suit "in reality is against the state itself." *Seminole*, 11 F.3d at 1029. The Court noted that IGRA imposes duties on "the States" and "not once does it impose duties or responsibilities on a particular officer of the state . . . ." *Id.* The Court of Appeals' analysis misconstrues the doctrine of *Ex parte Young*.

The issue of whether an action against a state officer is in reality one against the state simply does not arise if the action is within the doctrine of *Ex parte Young*. To be sure, this Court has noted that " '[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter.' " *Pennhurst*, 465 U.S. at 101 (quoting *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963)). But this "general rule" has no application in the context of an action under the doctrine of *Ex parte Young*:

> The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State. This was the holding of *Ex parte Young* . . . [W]hen a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct . . .

Pennhurst, 465 U.S. at 102-03. In short, an action for prospective injunctive relief against a state official regarding a claim under federal law is per se not a case against the state for purposes of the Eleventh Amendment. *See Green*, 474 U.S. at 68 ("a suit challenging the

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compel any discretionary act. Indeed, they do not compel any act at all. If a state opts out of the process, and does nothing at all, the only consequence is that the terms for a tribe to undertake Class III gaming will ultimately be set by the Secretary of the Interior.

constitutionality of a state official's action in enforcing state law is not one against the State . . .").

In addition, IGRA's references to "the State" do not render the doctrine of *Ex parte Young* inapplicable. To begin with, "an American State can act only through its officials." *Pennhurst*, 465 U.S. at 114 n.25. Further, *Ex parte Young* was itself an action against a state attorney general to prevent him from enforcing a statute in violation of the Fourteenth Amendment—which contains express prohibitions against actions by a "state", and does not refer to any duties of state attorneys general or other officials. Contrary to the Court of Appeals' position, duties imposed on states by federal law are at the heart of the *Ex parte Young* doctrine.[15]

In short, as against the Governor, this action may properly proceed under the doctrine of *Ex parte Young*.

III. CONGRESS HAS THE POWER TO AUTHORIZE THIS ACTION AGAINST THE STATE

A. This Action Does Not Substantially Implicate the Core Interests Underlying the Eleventh Amendment

Earlier this Term, this Court articulated the dual interests at the heart of the Eleventh Amendment—the prevention of money judgments by federal courts that must be paid by state treasuries, and the protection of the integrity owed states as sovereigns in our federal system. *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S.

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[15] *See, e.g., Edelman*, 415 U.S. at 654 n.3, 664 (requiring that a "state plan" for federal benefits conform to specific time and other requirements; no federal law duty imposed on any specified state official); *Native Village of Venetie I.R.A. Council v. Alaska*, 918 F.2d 797, 800-02 (9th Cir. 1990) (upholding an *Ex parte Young* action against state officials arising under 25 U.S.C. § 1911(d), which requires that "every State . . . give full faith and credit" to child custody proceedings of Indian tribes; no federal law duty imposed on any specified state official).

——, 130 L.Ed.2d 245 (1994). This case seeks only prospective injunctive and declaratory relief. In addition, it arises under a federal statute that, far from undermining the integrity of the states, actually enhances the potential scope of state authority. Accordingly, the state interests at the core of the Eleventh Amendment are not substantially involved here.

1. *This action does not seek money damages against the state*

As the Court noted in *Hess*, quoting from Justice Stevens' dissent in Pennhurst:

> Adoption of the [Eleventh] Amendment responded most immediately to the States' fears that "federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 151 . . . (1984) (Stevens, J. dissenting).

Id., 130 L.Ed.2d at 255. The Court emphasized that "the impetus for the Eleventh Amendment" was "the prevention of federal court judgments that must be paid out of a State's treasury", and affirmed that "the vulnerability of the State's purse" is "the most salient factor in Eleventh Amendment determinations." *Id.* at 260.

Hess, then, reinforced the principle—articulated earlier in *Edelman v. Jordan*, 415 U.S. 651 (1974)—that actions for money damages differ from actions for prospective injunctive relief for purposes of Eleventh Amendment jurisprudence. While the Eleventh Amendment generally bars money damage actions, the Court has invoked the fiction of *Ex parte Young* to permit actions against state officials for prospective injunctive relief regarding violations of federal law. As the Court has stated:

> Both prospective and retrospective relief implicate Eleventh Amendment concerns, but the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause. Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. . . . But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.

Green, 474 U.S. at 68 (citation omitted). In other words, notwithstanding the Eleventh Amendment, actions for prospective injunctive relief are not only permissible, but necessary, to protect the supremacy of federal law.

While the Court has thus drawn a sharp distinction between prospective injunctive relief and damages for Eleventh Amendment purposes, it has not yet had occasion to apply that distinction where Congress expressly provides for a cause of action against a state. The leading cases regarding Congressional authority to subject states to suit involve claims for money damages. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). Likewise, money damages were at issue in this Court's cases articulating the requirement of a clear statement by Congress to subject states to suit. *Blatchford v. Native Village of Noatak*, 501 U.S. ——, 115 L.Ed.2d 686 (1991); *Dellmuth v. Muth*, 491 U.S. 223 (1989); *Welch v. State Dep't of Highways and Public Transp.*, 483 U.S. 468 (1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985); *Employees of the Dep't of Pub. Health & Welfare v. Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973).

This case—unlike the prior cases before the Court—involves Congress expressly providing for suits against states only for prospective injunctive relief. The core interest of the Eleventh Amendment—the state treasury—is not at stake here. On the other hand, the fundamental federal interest in the Supremacy Clause—the vindication of federal law—is directly implicated. In *Ex parte Young*

and its progeny, this Court balanced the state interest in immunity from suit and the federal interest in the supremacy of federal law and held that actions against state officials for prospective injunctive relief regarding violations of federal law are not barred by the Eleventh Amendment.

The same reasoning applies here. Indeed, the presence of an express Congressional cause of action against a state reinforces the Supremacy Clause interests that gave rise to the doctrine of *Ex parte Young*. This Court in applying the doctrine of *Ex parte Young* has determined that suits for prospective injunctive relief are needed to protect the supremacy of federal law even where Congress is silent regarding the need for such suits. In this case Congress has expressly provided that such a cause of action is necessary to assure that the integrity of IGRA is not undermined by unreasonable action by a state. It would be an odd result indeed to hold that the Court is free to create the fiction of *Ex parte Young* to permit suits for prospective injunctive relief regarding violations of federal law, but that Congress is powerless to provide for such suits to protect the efficacy of its own statutes. Such a result would be particularly anomalous because the Eleventh Amendment—by its own terms—restricts judicial power, not the power of Congress.

In sum, for essentially the same reasons that suits for prospective injunctive relief against state officials for violations of federal law do not run afoul of the Eleventh Amendment under *Ex parte Young*, suits for prospective injunctive relief against states for violations of federal law—expressly provided for by Congress—are also not barred by the Eleventh Amendment. The Supremacy Clause requires that suits for prospective injunctive relief—like this one—be available to vindicate federal law. The more difficult issue—whether Congress may subject states to suits involving the core Eleventh Amendment interest in protecting state treasuries from federal court money judgments—is not presented by this case.

2. *IGRA enhances state authority over Indian gaming*

Hess states that, in addition to concern for state treasuries, the Eleventh Amendment "emphasizes the integrity retained by each State in our federal system. . . ." *Hess*, 513 U.S. ——, 130 L.Ed.2d at 255. The Amendment " 'accords the States the respect owed them as members of the federation,' " and protects them from "affront[s] to the dignity" properly due them. *Id.*, 130 L.Ed.2d at 255 (citation omitted), 256.

As noted above, under this Court's ruling in *California v. Cabazon Band of Indians*, 480 U.S. 202 (1987), tribes could operate gaming on their reservations free from state regulation. IGRA, however, altered the result in *Cabazon*, providing a statutory scheme enabling states to participate—through negotiation of a compact—in the regulation of Indian gaming. This enhancement of state authority with respect to Indian gaming was not an "affront to the dignity" of the states that would implicate core Eleventh Amendment concerns. *Hess*, 513 U.S. ——, 130 L.Ed.2d at 256. On the contrary, far from encroaching on state sovereignty in a manner inconsistent with the respect due a state, IGRA expanded state sovereignty over tribal affairs in a virtually unprecedented manner.

B. Congress Has the Power to Subject States to Suit in Federal Court When Exercising Its Plenary Authority Over Indian Tribes

While this case does not touch state interests at the core of the Eleventh Amendment, it does involve the substantial federal interest in Congress' authority over Indian tribes. In IGRA, Congress balanced the interests of tribes, states and the United States with respect to Indian gaming. That balance is undermined by the ruling of the Court of Appeals—which ignored the breadth of Congressional authority over Indian affairs.

This Court has upheld "Congress' acknowledged powers of abrogation", *Dellmuth*, 491 U.S. at 227-28, in connection with legislation enacted under section 5 of the Fourteenth Amendment, and under the Interstate Commerce Clause. *Fitzpatrick*, 427 U.S. at 456; *Union Gas*, 491 U.S. at 19-20. In both cases, the Court emphasized that the Constitutional provisions under which Congress acted were intended significantly to alter the balance of federal-state power—providing plenary power to Congress, and correspondingly diminishing state power. The Court held that Congress, operating pursuant to such a Constitutional grant, has the power to subject states to suit, provided that it expresses its intent to do so in clear language.

The Court of Appeals held in this case that Congress enacted IGRA under the Indian Commerce Clause. *Seminole*, 11 F.3d at 1026. As this Court has reaffirmed often, with respect to Indian affairs, the Constitution provides plenary authority to Congress, and diminishes state authority. In other words, the Indian Commerce Clause—while encompassing a different subject matter [16] —shares with the Fourteenth Amendment and the Interstate Commerce Clause the fundamental characteristics held necessary to provide Congress with authority to subject states to suit.[17]

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[16] The Court of Appeals, relying on *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989), stated that the Interstate Commerce Clause and the Indian Commerce Clause have different functions which "mandate that they be treated distinctly." *Seminole*, 11 F.3d at 1027. But *Cotton Petroleum* held only that tribes were not properly treated as states for purposes of tax apportionment. 490 U.S. at 191-93. *Cotton Petroleum* did not address any issue relating to abrogation of state Eleventh Amendment immunity.

[17] In *Blatchford v. Native Village of Noatak*, 501 U.S. ——, 115 L.Ed.2d 686 (1991), this Court held that the "plan of the convention" did not limit the application of the Eleventh Amendment to suits by individuals. *Id.* at 694-96. In that case, the Tribe argued that since suits by certain other sovereigns (states and the United States) are not barred by the Eleventh Amendment, suits by tribes are likewise not barred. The Court rejected this argument. *Id.* at 696.

The only abrogation issue in *Blatchford* involved 28 U.S.C. § 1362 —a statute providing federal courts with jurisdiction over federal question actions brought by tribes. The Court held that this general statute—which is silent as to states—did not meet the clear statement test required to find abrogation of state immunity. *Id.* at 698-700.

The Indian Commerce Clause was adopted in response to the deficiencies of the Articles of Confederation, which left power over Indian affairs ambiguously divided between the states and the federal government. Under the Articles of Confederation, as James Madison explained:

> What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

The Federalist, No. 42, p. 217 (William R. Brock ed. 1992). Finding the arrangement of the Articles of Confederation unsatisfactory in this respect, the Framers adopted the Indian Commerce Clause to centralize the full sweep of Indian affairs in the federal government.

> Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. 1, § 8, cl. 3, that granted Congress the power to regulate trade with the Indians.

Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 n.4 (1985). The Constitution thus provided full and exclusive federal control over Indian affairs. As described by Chief Justice Marshall:

> That instrument [the Constitution] confers on Congress the powers of war and peace: of making treaties, and of regulating commerce with foreign nations, and among the several States, and with the Indian Tribes. *These powers comprehend all that is required for the regulation of our intercourse with the Indians.* They are not limited by any restriction on their free actions. The shackles imposed on this power, in the confederation, are discarded.

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) (emphasis added); *see also United States v. 43 Gallons of Whisky*, 93 U.S. 188, 194 (1876); *United States v. Mazurie*, 419 U.S. 544, 555-56 (1975); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 83-4 (1977); *Oneida*, 470 U.S. at 234. The broad grant of federal power in the Indian Commerce Clause also limits state authority. As this Court stated, " '[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.' " *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)).

In short, by adopting the Indian Commerce Clause as part of the Constitution, the states effectively consented to Congressional authority to subject states to suit, when Congress acts under the Indian Commerce Clause. Congress, then, acting under the Indian Commerce Clause, had the authority to subject states to suit by enacting IGRA.

C. Congress in IGRA Clearly and Plainly Expressed Its Intent to Subject States to Suit

"Every federal court that has considered the issue has concluded that the IGRA's language reveals a clear intent to abrogate the states' Eleventh Amendment immunity." *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991, 994 (9th Cir. 1994), *petition for cert. filed*, No. 94-357; *see also Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422, 1427-28 (10th Cir. 1994), *petitions for cert. filed*, Nos. 94-1029 & 94-1030. As the Court of Appeals stated in this case, Congress in IGRA "intended to abrogate the states' sovereign immunity," *Seminole*, 11 F.3d at 1024.

Moreover, the Court of Appeals' finding of clear Congressional intent to abrogate was correct. IGRA meets this Court's requirement of clear, direct language, specifically subjecting states to suit. *See Dellmuth*, 491 U.S. at 227-28; *Pennhurst*, 465 U.S. at 99; *Blatchford*, 501 U.S. ——, 115 L.Ed.2d at 698; *Hoffman v. Connecticut Income Dep't*, 492 U.S. 96, 101 (1989); *see also Astoria F.S. & L. Ass'n v. Solimino*, 501 U.S. ——, 115 L.Ed.2d 96, 104 (1991) (citing *Atascadero* as "requiring plain statement of intent to abrogate immunity of states under the Eleventh Amendment").

In IGRA, Congress specifically directed that tribes may sue states in federal court for failure to negotiate in good faith.[18] IGRA imposes the burden of proof on the state in such a suit,[19] and provides remedies in the event judgment is entered against the state.[20] Congress could not have included these provisions in IGRA without intending to subject states to suit, notwithstanding the Eleventh Amendment. Any other conclusion would deprive these sections of IGRA of all meaning and effect. *See Seminole*, 11 F.3d at 1024. Accordingly, IGRA meets this Court's requirement that Congress must use clear, specific language to subject states to suit.

D. All Factors Support Congressional Power to Subject the State to This Suit

Under this Court's Eleventh Amendment cases, there are four key inquiries in determining whether a state is

[18] 25 U.S.C. § 2710(d)(7)(A)(i).

[19] 25 U.S.C. § 2710(d)(7)(B)(ii).

[20] 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii).

subject to an unconsented suit pursuant to an Act of Congress. First, is the fundamental state interest in protecting its treasury at stake? Second, is the dignity due to state sovereign authority being undermined? Third, did Congress act pursuant to a plenary Constitutional grant, intended to expand federal and diminish state authority? And fourth, did Congress expressly provide for the suit against the state?

In this case, all four factors strongly support a finding that Congress has the power to subject the State to a good faith lawsuit under IGRA, notwithstanding the Eleventh Amendment. The suit is for prospective injunctive relief and does not threaten the fundamental state interest in its treasury. IGRA provides an enhancement of state sovereign authority over Indian gaming, and does not stand as an affront to state sovereignty. Congress enacted IGRA under its plenary power over Indian affairs—a power intended to remove states from the fray of Indian affairs. And finally, the language of IGRA clearly subjects the states to suit. The Court need not address the more difficult issue of Congressional power to authorize suits against states when these factors are aligned differently. All that is required here is a ruling that in the unique circumstances of this case—where Congress, acting pursuant to its broad power over Indian affairs, expressly subjects states to suits for prospective relief only, under a statute that enhances state sovereignty—Congress acted within its authority.

CONCLUSION

For the foregoing reasons, the ruling of the Court of Appeals on the applicability of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and on Congress' authority to subject states to suit for prospective injunctive relief under IGRA, should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1994

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GOVERNOR OF FLORIDA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether an Indian Tribe may sue a State or its Governor in a federal court under the Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7), notwithstanding the inability of the court under the Act to issue an enforceable judgment vindicating the Tribe's interests and notwithstanding the States' general sovereign immunity from suit in federal court.

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INTEREST OF THE AMICI CURIAE

Amici, organizations whose members include state and local governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. This case raises just such issues: whether a Tribe may sue a State or its Governor in a federal court under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710(d)(7), notwithstanding the inability of the court under the Act to issue

an enforceable judgment vindicating the Tribe's interests and notwithstanding States' general sovereign immunity from suit in federal court. The Court's decision in this case will affect a significant number of suits under IGRA itself and, more generally, clarify the amenability of States and state officials to suit in federal court. *Amici* have a strong interest in the correct resolution of the issues presented.[1]

STATEMENT

The Seminole Tribe of Florida brought this suit against the State of Florida and its Governor under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2710 (d)(7)(A), (B), alleging a violation of the statutory duty to negotiate in good faith for the purpose of entering into a Tribal-State compact governing the conduct of "Class III" gaming activities, a category that includes casino gambling, lotteries, and other forms of gaming. 25 U.S.C. §§ 2703(8), 2710(d)(3)(A). The Tribe's complaint rested specifically on the State's refusal to negotiate about casino gaming, which Florida viewed as outside the IGRA duty because Florida law generally does not permit anyone to engage in casino gaming. *See* 25 U.S.C. § 2710(d)(1)(B) (Class III gaming activities are lawful, and hence subject to the negotiation duty, only if the State "permits *such* gaming" by others (emphasis added)). The Tribe's suit alleged that IGRA applies here because Florida law permits non-casino types of Class III gaming (and because Florida did not enforce its gaming laws against charities that hold casino nights). *See* Pet. App. 54a-55a, 61a. The parties disagreed, at bottom, about whether IGRA applies to each type of Class III game separately or whether States must negotiate about all types of Class III games if they allow any type.

The defendants moved to dismiss the suit, asserting sovereign immunity as recognized by the Eleventh

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

Amendment. The district court denied the motion, holding that Congress abrogated, and had the constitutional power to abrogate, such immunity in IGRA. Pet. App. 26a, 30a. On an interlocutory appeal, the Eleventh Circuit reversed. *Id.* at 1a-25a. Although the court of appeals agreed with the district court that Congress intended to abrogate States' immunity in IGRA (*id.* at 14a-15a), it concluded that Congress lacked constitutional authority under the Indian Commerce Clause to effect such abrogation. *Id.* at 18a-22a. The court of appeals also held that the Tribe's claim against the Governor was in reality one against the State and could not be brought within the exception to Eleventh Amendment immunity recognized in *Ex Parte Young*, 209 U.S. 123 (1908). Pet. App. 23a-24a. The court accordingly ordered the case dismissed.[2]

SUMMARY OF ARGUMENT

The Tribe's suit was correctly ordered dismissed because allowing federal-court jurisdiction over the suit would violate two distinct constitutional constraints. The first constraint is the Article III prohibition on federal courts' performance of adjudicatory roles inconsistent with the historically accepted notion of "judicial" power. The second constraint is the constitutional prohibition, implicit in Article III and recognized in the Eleventh Amendment, on federal courts' entertaining suits against States where sovereign immunity has not been waived or validly abrogated.

I. IGRA assigns a non-judicial task to the federal courts in violation of Article III. IGRA does not provide for a judicially enforceable judgment that itself vin-

[2] While the interlocutory appeal was pending, the district court decided the merits of the case, granting summary judgment to the state defendants by adopting, in accord with other courts' decisions, the State's game-specific view of the scope of the IGRA duty. Pet. App. 43a-83a. The Tribe's appeal from that judgment is pending in the Eleventh Circuit. *Id.* at 84a.

dicates the Tribe's asserted interests. Rather, the federal court under IGRA can do no more than pronounce a federal-law violation; it cannot carry that judgment into effect so as to secure relief for the Tribe, which must proceed to a non-Article III process (first a mediator, then the Executive Branch) in order to obtain actual relief. The unenforceability of the court's judgment and the dependency on subsequent discretionary Executive Branch action both render IGRA's assignment of jurisdiction to the federal courts inconsistent with long-established principles defining the essential nature of the judicial power under Article III. *See, e.g., Gordon v. United States*, 117 U.S. 697, 702-03 (decided 1864, printed 1886) (opinion of Taney, C.J.); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). Congress, in its effort to avoid independent federalism problems presented by greater intrusions on state sovereignty (*see New York v. United States*, 112 S. Ct. 2408 (1992)), has created a scheme that asks the Article III courts to play an improperly non-judicial role.

II. Independently of that Article III problem, the Tribe's suit was correctly ordered dismissed because both defendants, the Governor and the State, are protected from the suit by the sovereign immunity recognized in the Eleventh Amendment. As to the Governor, the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), should be held inapplicable. *Young* states a doctrine of federal necessity, generally allowing federal courts to *enjoin* state officers to conform their future conduct to federal-law standards; even then, because *Young* displaces an otherwise-available constitutional immunity, the doctrine has been carefully limited so as itself to accommodate States' interests. *See, e.g., Green v. Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984). Under IGRA, however, the federal court does not issue an injunction compelling compliance with any federal-law standards; and any claim of "necessity" for the federal courts' role in vindicating federal standards (which Congress has refused to set) is utterly hollow. At the same time, applying *Young* to IGRA would involve an extraordinary (if not novel) intrusion on States' sovereign interests, since the object of the IGRA suit is to produce an affirmative exercise of state lawmaking authority (rules for tribal gaming) as a substitute for federal policy choice on the subject. *Cf. New York v. United States, supra.* For each of those reasons, the *Young* exception to the otherwise-fundamental sovereign-immunity principle of our federalist structure should not apply here.

Eleventh Amendment immunity therefore bars this suit unless the immunity has been validly abrogated. But IGRA should not be read as providing a sufficient basis for concluding that the immunity has been abrogated. The Court has made clear that, to find abrogation, it must have "perfect confidence that Congress *in fact intended*" to override States' sovereign immunity. *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989) (emphasis added). IGRA's reference to "State[s]" (25 U.S.C. § 2710(d)(7)) is the sole asserted basis for finding abrogation, but that reference should not by itself be deemed sufficient to demonstrate—in the absence of any other evidence of congressional consideration of the constitutionally significant matter of displacing States' immunity—that Congress actually intended abrogation. Rather, the statute is much more plausibly understood as reflecting a congressional assumption (mistaken, as we have argued) that *Ex Parte Young* made any abrogation unnecessary.

If IGRA is nevertheless read to reflect an intent to abrogate States' immunity, Congress should be held to lack the constitutional power to do so under the Indian Commerce Clause and, indeed, more generally under Article I. As to the narrower point, even if this Court continues to adhere to the holding of *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), that Congress has abrogation authority under the Interstate Commerce Clause, no such authority should be found under the Indian Commerce Clause. The mutuality of interests among the States in legislative power to regulate inter*state*

commerce (power that is intrinsically concerned with protecting States against each other) is at least a conceptually plausible starting point for inferring a structurally implicit "surrender of [sovereign] immunity in the plan of the convention." *Union Gas*, 491 U.S. at 19 (plurality opinion) (internal quotation marks omitted). That starting point is unavailable for congressional authority under the Indian Commerce Clause, because no comparable mutuality inheres in such authority. Indeed, this distinction is mirrored in the Court's decisions in a closely analogous context: although the Eleventh Amendment does not protect States against suits by other States, it does protect States against suits by Tribes. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

In any event, this Court should overrule *Union Gas* and find abrogation authority generally lacking under Article I. Fresh consideration of the Article I issue is warranted because there was no rationale of the Court in *Union Gas* (the fifth vote was wholly unexplained) and federalism interests have acquired greater recognition in constitutional doctrine since *Union Gas* was decided. On reconsideration, the issue should be decided in accord with the fundamental principle that Congress has no power under Article I to assign the federal courts judicial power outside the limits set by Article III—a principle recognized in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in *Hayburn's Case, supra*, and often since. Allowing abrogation under Article I would violate that principle because States' sovereign immunity is an implicit limit on the judicial power created by Article III. *See Pennhurst*, 465 U.S. at 98; *Hans v. Louisiana*, 134 U.S. 1 (1890). This principle preventing Article I authority from expanding Article III power has special force as applied to an Article III limit, like sovereign immunity, that gives effect to a basic component of our federalist structure. And on the other side of the federal-state balance, there is no sound reason to conclude that a newly broad Article I abrogation authority is peculiarly necessary to vindicate the supremacy of federal law. Finally, the

authority of Congress to abrogate States' immunity under the Fourteenth Amendment—which modified pre-existing constitutional limits on federal power over States on a specifically defined set of subjects—furnishes no basis for inferring that States broadly surrendered their right to insist on sovereign immunity in the plan of the original convention.

ARGUMENT

I. JURISDICTION OVER THE TRIBE'S SUIT IS INCONSISTENT WITH ARTICLE III BECAUSE THE FEDERAL COURT CANNOT ISSUE AN ENFORCEABLE JUDGMENT VINDICATING THE TRIBE'S INTERESTS

The cause of action created by IGRA assigns a novel and dramatically limited role to the federal court hearing the claim. Even if the court agrees with the Tribe's complaint that the State is acting unlawfully (*i.e.*, is failing to negotiate in good faith), the court cannot issue an enforceable order that vindicates the interests asserted in the suit; indeed, real relief for the Tribe ultimately is available only from the Executive Branch. The issuance of an unenforceable judgment declaring a defendant's conduct unlawful, backed by no ability on the part of the judiciary to award any concrete relief, retrospective or prospective, is not a function within the "judicial power" of the federal courts as it has long been understood. Accordingly, the Tribe's suit should be held to exceed the bounds set by Article III and for that reason be dismissed.[3]

A. It has been clear for 200 years that Congress may not assign to the federal courts adjudicatory tasks outside the scope of the "judicial power" contemplated by Article III of the Constitution. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Muskrat v. United States*, 219 U.S. 346, 352-56 (1911). And, as this Court has recently

[3] This issue, though not previously raised and not among the questions on which certiorari was granted, is properly raised in this Court because it is jurisdictional.

reiterated, the "judicial power" created by Article III encompasses certain historically understood essential components, including the power to decide a case conclusively. *Plaut v. Spendthrift Farm, Inc.*, 63 U.S.L.W. 4243 (Apr. 18, 1995). The task assigned to the federal court by IGRA implicates two aspects of the "judicial power" that are closely related to, and equally well-founded in accepted understanding as, those underlying the decision in *Plaut*.

First, numerous decisions of this Court have explained that the judicial power necessarily includes the power to render a judgment, enforceable by the judiciary, that vindicates the legal interest of the plaintiff. "The award of execution is a part, and an essential part of every judgment passed by a court exercising judical power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy." *Gordon v. United States*, 117 U.S. 697, 702-03 (decided 1864, printed 1886) (opinion of Taney, C.J.) (cited with approval in *Plaut*, 63 U.S.L.W. at 4248); *see In re Sanborn*, 148 U.S. 222, 224 (1893) (following *Gordon*'s holding that "as the so-called judgments . . . were not obligatory upon Congress or upon the executive department of the government, but were merely opinions which might be acted upon or disregarded by Congress or the departments, and which this court has no power to compel the court below to execute, such judgments could not be deemed an exercise of judicial power"); *ICC v. Brimson*, 154 U.S. 447, 484 (1894) (quoting *Gordon*, 117 U.S. at 702); *Muskrat*, 219 U.S. at 356, 362 (" 'Judicial power,' says Mr. Justice Miller in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.' "; holding assignment of power invalid because "[i]n a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question"); *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948) ("if the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render"). *See also National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 630 (1949) (Vinson, C.J., dissenting) (Court's decisions "clearly condition the power of a constitutional court to take cognizance of any cause upon . . . the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision") (citing *Muskrat* and *Gordon*).

Second, and relatedly, the Court has made clear in a long line of decisions growing out of *Hayburn's Case* that actual vindication of the plaintiff's interest must be provided by the court's judgment and cannot be made contingent on the subsequent discretionary decision of another branch of the federal government. *See Chicago & Southern Air Lines*, 333 U.S. at 113-14 ("It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action."), citing *Hayburn's Case; United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851); *Gordon; Brimson; La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899); *Muskrat; United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386 (1934). Because it is the *judgment* awarding relief that is the essential component of the judicial function, not the factual or legal determinations made by the court on the way to entering the judgment,[4] this Article III problem is present whenever the court's ability to

[4] The Court confirmed this in its recent decision in *Plaut*, where the reopening of the final judgment by another Branch did not repudiate any factual or legal determinations underlying the reopened judgment, but changed the substance of the law that was the sole basis for the judgment. 63 U.S.L.W. at 4245 (statute presented no problem under *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), because it changed the law).

award relief is made dependent on subsequent non-ministerial Executive Branch action, even if the Executive is bound to follow component findings of fact or conclusions of law. Non-judicial discretion subsequently to deny the relief sought in the suit creates the *Hayburn's Case* problem.

B. The function assigned to the court by IGRA is incompatible with each of these deeply entrenched understandings defining the Article III concept of judicial power, because of "the limited nature of the relief" (U.S. Br. 25) that IGRA authorizes the judiciary to provide. The statute carefully "prescribes remedial procedures if the district court finds" that the State did not engage in good faith negotiation (U.S. Br. 16). *See* 25 U.S.C. § 2710(d)(7)(B). But those procedures do not allow the district court's judgment to vindicate the Tribe's interests. Worse, concrete vindication of the Tribe's interests ultimately is available, not through the courts, but only by subsequent discretionary action of the Executive Branch.

The Tribe has some interest simply in having the State *negotiate* in good faith, whether or not they conclude a compact on Class III gaming. But that interest is not vindicated by the federal court under IGRA, because IGRA, by its terms, does not provide for an order directing the State to negotiate—much less a judicially enforceable order. Rather, the statute expressly prescribes that the court, if it finds lack of good faith negotiation toward a compact, issue an order to "conclude such a compact" within 60 days. Paragraph (iii).[5] Even then, the court has no power to compel compliance with that order: if the State violates it, by not concluding a compact, IGRA expressly provides that the court merely appoints a mediator—and the court plays no further role. Paragraph (iv). As the Tribe indicates, "[t]he relief sought by the Tribe is an order either to conclude a compact within

[5] We refer here, and in the next several paragraphs in text, to paragraphs of 25 U.S.C. § 2710(d)(7)(B).

sixty days, or to invoke the alternative procedure of mediation." Pet. Br. 29. The State is at no point judicially forced to negotiate.

Although IGRA gives Tribes no more than a legal right to have the State negotiate in good faith, the Tribe's ultimate interest, of course, is in securing a compact from the State or otherwise gaining permission for Class III gaming. And the district court under IGRA, upon finding lack of good faith negotiation, does direct the Tribe to enter a compact. Paragraph (iii). But that order, while on its face seeming to vindicate the Tribe's interest, is only a paper vindication, because it is in no way enforceable by the courts, such as through the usual means applicable to prospective relief, *i.e.*, contempt. Rather, as just noted, if the State fails to conclude a compact, the statute specifies that the court drops out of the picture after referring the entire matter to a mediator. Paragraph (iv). Again, the Tribe cannot, in its lawsuit, judicially secure a compact or other authority for Class III gaming.

In fact, the Tribe cannot, under IGRA, secure any agreement from the State at all. The mediator appointed under IGRA, like any "mediator," cannot impose an agreement: after choosing between the Tribe's and State's proposals "the one which best comports with the terms of [IGRA] and any other applicable Federal law and with the findings and order of the court" (paragraph (iv)), the mediator asks the parties to agree to the choice. Paragraph (v). If no agreement is forthcoming, the Secretary of the Interior takes over the process and, rather than ordering any Tribe-State compact, adopts federal regulations for Class III gaming. Paragraph (vii). Ultimately, then, it is only the Secretary, necessarily exercising a substantial range of discretion, who can provide the Tribe the gaming authority it seeks.[6]

[6] The decision of the Secretary, who is directed to adopt regulations "consistent with" the mediator's choice (paragraph (vii)), at a minimum incorporates the range of discretion exercised by the mediator in choosing the "best" proposal. *See* paragraph (iv); S. Rep. No. 446, 100th Cong., 2d Sess. 19 (1988) (describing range

The Tribe and the United States agree that the judiciary when applying IGRA lacks authority actually to issue an enforceable award of concrete relief. Thus, the Tribe acknowledges that the court's order is "an order which the state can disregard" (Pet. Br. 26) without judicial sanction. And the United States observes that "there is no indication that the State's failure to agree to a compact (or even to participate in negotiations) during [the 60-day] period was intended to expose the State to any more intrusive order or to contempt." U.S. Br. 25.

What IGRA provides for, in short, is a wholly unenforceable judicial pronouncement. This Court has long made clear that Article III does not allow the federal courts to perform such a role. That is enough to invalidate IGRA's assignment of jurisdiction to the federal courts. Worse still, IGRA treats the federal court as merely the first step in a process under which real relief is available only through the subsequent discretionary act of the Executive Branch. That, too, violates long-standing Article III principles.

C. This problem cannot be solved by treating the judgment under IGRA as if it were a declaratory judgment under 28 U.S.C. § 2201, whose general validity under Article III this Court has upheld. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937); *Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249 (1933). For one thing, IGRA by its terms does not provide for a declaratory judgment, but for a carefully defined form of limited relief, and thus occupies the remedial field to the exclusion of 28 U.S.C. § 2201. *See Katzenbach v. Mc-*

of relevant factors). In fact, the statute surely must be read to authorize the *Secretary* to exercise the full range of available discretion. Against the background of the Constitution's separation of powers, Congress cannot be assumed to have conferred discretionary executive power over States on a "mediator," an inferior officer in Appointments Clause terms, appointed by a court and not apparently accountable to the Secretary. *See Morrison v. Olson*, 487 U.S. 654, 675-77 (1988) ("incongruity" standard for cross-Branch appointments).

Clung, 379 U.S. 294, 296 (1964).[7] In any event, no decision of this Court suggests that an action for a declaratory judgment would be consistent with Article III if, as under IGRA, the judgment provides no judicially enforceable relief or, worse, requires subsequent discretionary Executive Branch action to be effective.

To the contrary, the federal declaratory judgment statute has long provided that the judicial declaration of rights is backed by the court's power to enforce the declaratory judgment, if necessary, through further appropriate relief. *See* 28 U.S.C. § 2202; *Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A declaratory judgment can then be used as a predicate to further relief, including an injunction."). That enforcement power was present in the seminal decisions of this Court holding, contrary to earlier decisions, that Article III does not bar *all* actions for a declaratory judgment. *Aetna*, 300 U.S. at 236 n.1; *Nashville*, 288 U.S. at 260. And those decisions pointedly stressed, in finding no Article III problem, that the judgments were not subject to executive revision (*Nashville*, 288 U.S. at 262, citing *Gordon, supra*) and produced "specific relief through a decree of a conclusive character" (*Aetna*, 300 U.S. at 241, citing *Muskrat, supra*). *See also Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237 (1952). It is these fundamental Article III requirements,

[7] Although the Tribe here pleaded 28 U.S.C. § 2201 in its complaint (J.A. 13a), neither the Tribe nor the United States relies on that provision in their briefs—presumably because any such reliance would be incompatible with their firm insistence, in trying to minimize concern on the Eleventh Amendment issues, that the State is free to "disregard" the district court's judgment in this suit (Pet. Br. 26; *see also* Pet. Br. 29) and that the district court's order under IGRA cannot be enforced by injunction (U.S. Br. 25). As noted below, declaratory judgments under 28 U.S.C. § 2201 *are* enforceable under 28 U.S.C. § 2202.

The same problem of inconsistency with IGRA would plague any invocation of other remedies (in federal or state court) that go beyond the carefully prescribed remedial procedures of IGRA.

which must be met even for a declaratory judgment action to be valid, that IGRA fails to meet.[8]

The Article III problems with IGRA likewise cannot be solved by analogy to the judicial role in certain labor-law cases. Under the National Labor Relations Act, for example, a federal court can hear a suit alleging a lack of good faith bargaining and render a judgment ordering good faith bargaining. 29 U.S.C. §§ 158(d), 160(a), (c), (e). The federal court's order, however, is classically judicial: an injunction backed by the power of contempt for its violation. *See NLRB v. Warren Co., Inc.*, 350 U.S. 107, 112-13 (1956). The judicial role in that situation thus furnishes no precedent for the non-judicial role assigned to federal courts by IGRA.

D. The Article III problem with IGRA cannot properly be avoided by a judicial construction of the statute that would ignore "the limited nature of the relief authorized by IGRA" (U.S. Br. 25) by expanding the courts' remedial authority. As a matter of congressional intent, the "innovative" jurisdictional scheme set up by IGRA (U.S. Br. 28) must be understood as an essential element of Congress's careful balancing of competing tribal and state interests, achieved after years of effort. *See* S. Rep. 446, *supra*, at 13-14; *see generally* Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?*, 26 Creighton L. Rev. 387, 395-403 (1993). Construing IGRA to authorize greater judicial power than the text allows "would destroy the delicate federal/tribal/state balance sought by the Act." Pet. Br. 14. *See also* 134 Cong. Rec. 25,377 (1988)

[8] These basic requirements were not repudiated by *Steffel v. Thompson*, 415 U.S. 452 (1974), which nowhere held that a federal court may issue a declaratory judgment that the defendant is free to disregard (as under IGRA) without any judicial sanction (federal or state). It seems clear, in fact, that a declaratory judgment issued under *Steffel*, like other declaratory judgments, may be enforced, if necessary, under 28 U.S.C. § 2202. *See Wooley v. Maynard*, 430 U.S. 705, 710-12 (1977) (injunction allowed if necessary).

(remarks of Rep. Udall) ("S. 555 is a delicately balanced compromise.").

A more intrusive remedy would also raise other constitutional concerns, which Congress gave no indication it intended to raise. As this Court made clear in *New York v. United States*, 112 S. Ct. 2408 (1992), given the structure of federalism embodied in the Constitution and reflected in the Tenth Amendment, a serious question is presented when Congress, rather than itself making and administering policy in an area at the federal level, forces States to exercise the States' own sovereign governmental authority. *Id.* at 2420-21. A reading of IGRA that would authorize federal court *compulsion* of States to negotiate a legislative deal with Tribes, as a substitute for a federal policy determination of the scope of any authority for Class III gaming, would raise precisely that constitutional question. The Article III problem with IGRA, created by an attempt to avoid federalism difficulties, cannot be solved by a judicial rewriting of IGRA that would raise those difficulties.

II. THE FEDERAL COURT'S EXERCISE OF JURISDICTION OVER THE TRIBE'S SUIT VIOLATES THE CONSTITUTION'S PROTECTION OF THE STATES' SOVEREIGN IMMUNITY

A. *Ex Parte Young* Does Not Remove The Tribe's Claim Against The Governor From The Coverage Of Eleventh Amendment Immunity

The Tribe and the United States suggest that the principal Eleventh Amendment question at issue here—whether IGRA validly abrogates States' immunity—may be avoided, at least as a practical matter, by invocation of *Ex Parte Young*, 209 U.S. 123 (1908). *See* Pet. Br. 23-31; U.S. Br. 12-19 & n.5. Under that theory, the Tribe's claim against the Governor is not truly a suit against the State within the meaning of the Eleventh Amendment (*see, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974)), so that no immunity question would arise with respect to the Tribe's claim against the Governor. This

invocation of *Ex Parte Young* should be rejected, because the Tribe's suit under IGRA presents a radically different balance of federal and state interests from the balance justifying application of the *Young* doctrine.

The starting point is the basic principle that a suit against a state official seeking relief that runs against the office holder in that person's official capacity is in reality a suit against the State. *See Hafer v. Melo*, 502 U.S. 21, 25-27 (1991); *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). This Court in *Ex Parte Young*, however, created a legal "fiction" carving out an exception to that basic principle. *See Pennhurst*, 465 U.S. at 105; U.S. Br. 25 (*Young* creates " 'fiction' " where State is real party in interest). Under that exception, a suit against a state officer seeking an *injunction* against future violations of federal law generally is deemed not to be a suit against the State for purposes of States' Eleventh Amendment immunity. *See, e.g., Pennhurst; Edelman.*

This doctrine rests on a judgment about constitutional "necessity" as a justification for overriding the otherwise-applicable constitutional immunity of States in a particular class of cases. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S. Ct. 684, 688 (1993) (*Young* "is regarded as carving out a necessary exception to Eleventh Amendment immunity"); *see Green v. Mansour*, 474 U.S. 64, 68 (1985); *Pennhurst*, 465 U.S. at 105. In our federalist system, *Young* makes clear, the supremacy of federal law requires that federal courts be able to enjoin state officers' future non-compliance with federal-law standards in order "to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.' " *Pennhurst*, 465 U.S. at 105 (quoting *Young*, 209 U.S. at 160). Even so, as an exception to fundamental structural constitutional principles, the *Young* doctrine has been carefully confined to apply only where *necessary* to vindicate federal interests; beyond that, the Court has explained "that the need

to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst*, 465 U.S. at 105.

The first, sufficient reason why the Tribe's suit under IGRA is outside the ambit of *Young* is that there is little if any "federal necessity" for allowing the IGRA claim. As we have explained, and the Tribe and the United States vigorously insist, "the limited nature of the relief authorized by IGRA" (U.S. Br. 25) means that the federal court under IGRA issues no injunction or other enforceable order that compels the Governor to adhere to federally established standards. The federal court cannot enforce compliance with the federal duty asserted, *i.e.*, cannot compel negotiation (or agreement). Even if the court's role under IGRA is permitted by Article III (*but see* Argument I, *supra*), it is decidedly beyond the reach of the *Ex Parte Young* doctrine. *Cf. Green v. Mansour*, 474 U.S. at 73 (declaratory relief would threaten *Edelman* limit on *Young* if not related to injunctive relief). There can be no plausible claim that any structural *need* to vindicate the supremacy of federal law, on which *Young* rests, requires that state officials be subject to a judicial order that "the state can disregard" (Pet. Br. 26), for such an order does not "*secure* compliance with federal law" (U.S. Br. 13 (emphasis added)). Because the entire justification for *Young* is absent, the doctrine should not apply to the peculiar cause of action created by IGRA.[9]

Ex Parte Young should, if necessary, be held inapplicable for a second reason as well: the interests on the state side of the constitutional balance are distinctively

[9] The Eleventh Circuit, in finding *Young* inapplicable, alluded to the unenforceability of the judicial order under IGRA as follows: "since IGRA provides a procedure should the state decide not to negotiate, even the mere question of whether the state should negotiate at all is subject to discretion." Pet. App. 23a-24a, quoted at Pet. Br. 29. As noted above, the limited character of the federal intrusion cannot be disregarded, because it reflects federalism principles that are an essential aspect of IGRA.

strong. In the ordinary *Young* situation, a state official is enjoined to refrain from executive or administrative actions that violate substantive federal standards governing such actions (set by the Constitution or by federal statute or regulation). Under IGRA, by contrast, the suit seeks ultimately to require an affirmative exercise of state legislative authority (setting rules for tribal gaming), essentially as a substitute for federal policy choice in the area. *See* Pet. App. 23a. The intrusion on state sovereignty is categorically extraordinary, if not wholly unprecedented, in this circumstance. *Cf. New York v. United States* (special category of federalism problems with federal directives requiring the exercise of state legislative authority). Holding the *Young* doctrine inapplicable in this unusual situation would appropriately "accommodate[]" the doctrine to reflect States' constitutional interests (*Pennhurst*, 465 U.S. at 105) while leaving unimpaired the federal government's power to make needed policy choices, and set enforceable federal standards, itself. In short, *Young* should not apply to IGRA because, in addition to the federal interest being distinctively weak, the State's interest—in being treated as a State when its most sovereign function is at stake—is distinctively strong.

It is no answer to say that Eleventh Amendment immunity is chiefly concerned with money judgments. This Court has often held that the Eleventh Amendment's "jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst*, 465 U.S. at 100; *see Cory v. White*, 457 U.S. 85, 90-91 (1982); *Missouri v. Fiske*, 290 U.S. 18 (1933). Moreover, the principle of sovereign immunity, protecting States' dignity and independence (*Puerto Rico Aqueduct & Sewer Auth.*, 113 S. Ct. at 689), is centrally implicated by federal intrusions into the exercise of state lawmaking power. What is distinctive about injunctive claims, under *Young*, is not that the States' interest is weaker, but that the necessity justification for *overriding* the States' immunity is stronger. Where no such justification is present, however, the constitutional protection of States' immunity retains its full force. Accordingly, the Tribe's suit should be recognized as one entirely against the State, subject to dismissal under the Eleventh Amendment unless Congress has validly abrogated States' immunity.

B. Congress Did Not Clearly Intend In IGRA To Abrogate The States' Eleventh Amendment Immunity

The question of congressional power to abrogate States' Eleventh Amendment immunity need not be reached unless IGRA is construed as effecting such an abrogation. On this threshold issue of statutory interpretation, this Court has laid down "a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). This Court should hold that IGRA does not meet this standard.

The entirety of the argument for finding that IGRA effects an abrogation—unavoidably, because there is no other evidence of congressional consideration of the immunity question—is that the statute refers several times to the "State" in describing the Tribe's cause of action. *See* U.S. Br. 20. These references are indubitably a very important fact in the analysis, but to deem them utterly conclusive in the present circumstances would mistakenly treat the demand for clear textual statement as somehow an end in itself. In fact, the textual requirement is imposed, not for its own sake, but as a guarantor of the underlying congressional *intent* to take the constitutionally extraordinary step of overriding States' immunity: congressional intent to abrogate remains the test, and that intent must be proved with "certainty." *Atascadero*, 473 U.S. at 243 [10]; *see Dellmuth*, 491 U.S. at 231 ("the

[10] "[I]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guar-

salient point in our view is that it cannot be *said with perfect confidence that Congress in fact intended . . .* to abrogate sovereign immunity, and imperfect confidence will not suffice given the special constitutional concerns in this area" (emphasis added)). In IGRA, the references to the "State" are not enough to show "that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States." *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

The United States's discussion of *Ex Parte Young* (*see* U.S. Br. 18) effectively explains why the statutory language cannot carry the required weight. Because States "can act only through their officials" (U.S. Br. 18, citing *Pennhurst*, 465 U.S. at 114 n.25), the United States correctly insists that, when Congress used the word "State," it undoubtedly was contemplating that the negotiating obligation imposed by IGRA would fall on, and the suits invoking that obligation would be brought against, "those officials vested with authority under state law to negotiate on behalf of the States" (U.S. Br. 18).[11] Surely that is the natural congressional understanding behind the enactment of a statute that does not provide for retrospective relief, since the established doctrine of *Ex Parte Young* generally makes it unnecessary for a plaintiff suing under such a statute to name the State itself as a defendant and hence unnecessary for Congress to consider the question of, or decide to abrogate, Eleventh Amendment immunity.

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antees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty." *Atascadero*, 473 U.S. at 243.

[11] Congress likely assumed that in each State a particular official (particularly, the Governor) would have authority to conduct the negotiations required by IGRA. *See* Santoni, *supra*, at 424. The article just cited contains a list of compacts under IGRA as of 1993. Except for Kansas, we are aware of no evidence casting doubt on the complete authority of the Governor in each State, not only to negotiate, but to enter into compacts under IGRA. (With respect to Kansas, see *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491 (D.C. Cir. 1995).)

The text of IGRA is for that reason fully, and most naturally, understood as indicating only a congressional intent to authorize suits against state officials, for which Congress assumed that no abrogation of Eleventh Amendment immunity was required. And the relevant legislative history is, apparently, devoid of any evidence that Congress actually thought about the subject of Eleventh Amendment immunity and decided to abrogate it. That silence is telling in itself, because abrogation is, at a minimum, an extraordinary action in our federal system. *See Quern v. Jordan*, 440 U.S. at 343 (silence significant under 42 U.S.C. § 1983). It is even more significant against the background of grave uncertainty about Congress's constitutional authority to abrogate States' immunity under Article I. It would be surprising if Congress meant to exercise this disputed authority when it left no record of its consideration of the issue and almost surely assumed that it had no need to exercise the authority.

These compelling reasons to conclude that Congress did *not* make a decision to abrogate States' immunity are not altered by the fact, as we have argued, that Congress was mistaken in thinking that *Ex Parte Young* applies and makes abrogation unnecessary.[12] Whether or not Congress's assumption was erroneous, there is no indication that Congress intended to take away States' constitutional immunity. And, in a statute reflecting so delicate a balance of state, federal, and tribal interests, it cannot be assumed that Congress would have enacted the same scheme had it recognized that doing so would compel stripping States of their Eleventh Amendment immunity. For these reasons, the Court should find that

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[12] Congress may also have thought that 28 U.S.C. § 1362 abrogated immunity (*see Implementation and Enforcement of the Indian Gaming Regulatory Act*, Oversight Hearings before the House Comm. on Interior and Insular Affairs, 102d Cong., 2d Sess. 146, 149 (1992))—though that assumption has turned out to be incorrect. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

IGRA does not embody a clearly intended abrogation of Eleventh Amendment immunity.

C. Congress Lacked Power To Abrogate The States' Eleventh Amendment Immunity

This Court in *Union Gas* held that Congress has power to abrogate States' Eleventh Amendment immunity, but the plurality opinion was carefully limited to the question of power under the Interstate Commerce Clause. 491 U.S. at 13-23. Elsewhere, the Court has left open the question of abrogation authority under the Indian Commerce Clause. *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 252 (1985). This Court should, at a minimum, decide that no such authority exists under the Indian Commerce Clause. More broadly, *Union Gas* should be overruled and Article I authority to override States' sovereign immunity denied.[13]

1. *Even If* Union Gas *Is Correct, Congressional Power Is Lacking Under the Indian Commerce Clause*

Even if this Court declines to disturb the holding of *Union Gas* that Congress has abrogation authority under the Interstate Commerce Clause, the Court nevertheless should hold that abrogation authority is lacking under the Indian Commerce Clause. The plurality opinion in *Union Gas* accepted that, in order to find congressional authority to abrogate States' sovereign immunity under Article I, the Court has to find that "there has been '"a surrender of this immunity in the plan of the convention."'" *Union Gas,* 491 U.S. at 19 (plurality), quoting *Monaco v. Mississippi,* 292 U.S. 313, 322-23 (1934) (quoting *Federalist No. 81*). And in explaining why it found an implicit surrender with respect to the Inter-

[13] The lack of abrogation authority under Article I as a whole is a ground for answering the first question presented in the petition: does Congress have abrogation authority under the Indian Commerce Clause? Pet. i. The petition does not, however, encompass any claim that abrogation authority exists for IGRA solely under the Interstate Commerce Clause.

state Commerce Clause, the plurality relied centrally on the role played by that provision in solving problems of an inherently interstate character, where single-State solutions often affirmatively harm other States. *Id.* at 20-22 (discussing protectionist state environmental laws). That crucial starting point for the *Union Gas* inference of intrinsic surrender, however, is inapplicable to the Indian Commerce Clause.

As the example of state protectionist legislation discussed in *Union Gas* indicates, the congressional power to regulate *interstate* commerce rests, at least in large part, on the need for a national authority to protect the interests of the *States* themselves. Particularly in the early days of the federal government, when the Interstate Commerce Clause was used for the more focused purpose of protecting the commercial aspects of interstate commerce (*see* G. Gunther, *Constitutional Law* 97-98 (12th ed. 1991)), it would have been plausible for States to view legislation that imposed a duty on States' roles in certain interstate commerce as generally serving to protect the interests of other States in that commerce. In a constitutional sense, therefore, the States forming the Constitution might naturally have viewed themselves as having an inherent mutuality of interest in national legislative authority under the Interstate Commerce Clause. And that mutuality of interest lends some conceptual support to the notion that States, in the Convention, may have implicitly surrendered to Congress the power to hail States into federal court, ultimately for their reciprocal protection against each other.

No such concept of inherent mutuality, or reciprocity, applies under the Indian Commerce Clause. The interests served by statutes enacted under this provision, though they *might* include various States' interests, have no necessary or intrinsic connection to States' interests. The Indian Commerce Clause thus lacks a core feature undergirding any inference of implicit surrender of the full scope of sovereign immunity—*i.e.*, of unabrogable im-

munity, protected even against congressional override—under the Interstate Commerce Clause.

This distinction gains powerful support from this Court's decisions making an analogous distinction with respect to the basic Eleventh Amendment immunity itself. Whereas the Court has long held that States, by entering the Union, necessarily surrendered their entire immunity from suits by other States (*Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 720 (1838)), the Court recently has held that States did *not* surrender their immunity from suits by Tribes, because the intrinsic "mutuality" was lacking. *Blatchford*, 501 U.S. at 782. The same principle supports excluding the Indian Commerce Clause from any doctrine finding in the Interstate Commerce Clause an implicit surrender by States of part of their sovereign immunity.[14] Indeed, the Tribe recognizes that "*Blatchford* precludes the Seminole Tribe from arguing state consent in the 'plan of the convention'" (Pet. Br. 16)—the very standard applied by the plurality in *Union Gas*.

The Indian Commerce Clause is for the foregoing central reason a *less* plausible basis for abrogation authority than the Interstate Commerce Clause. Not surprisingly, therefore, there is little basis for the countervailing suggestions that this case is actually a *more* plausible candidate for finding an implicit surrender of partial immunity

[14] This point is not affected by the power of Congress to abrogate Tribes' sovereign immunity. *See Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). That authority is not based on any voluntary surrender of immunity by Tribes, which, unlike the States, did not join together to form the Constitution. *Blatchford*, 501 U.S. at 782. Any congressional authority to diminish the full protection of immunity enjoyed by States, in contrast, must come from a voluntary surrender in the Convention, as the plurality in *Union Gas* accepted. 491 U.S. at 19. The States, as the "parties" to the Constitution, could have a mutuality of concession in forming the Constitution that Indian tribes cannot. *Cf. Blatchford*, 501 U.S. at 782 (differences between States and foreign governments, in suing States, based on the different "role of each in the convention").

than *Union Gas*. Thus, although the Tribe heavily emphasizes the "plenary" nature of congressional power under the Indian Commerce Clause and the troubled pre-1787 experience that gave rise to that power (Pet. Br. 17-21), the United States properly avoids such an argument (U.S. Br. 24-28), because both parts of the Tribe's contention are equally true of the Interstate Commerce Clause. *See Union Gas*, 491 U.S. at 17 (plurality); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935). Likewise, we fail to understand how the absence of direct tribal representation in Congress (Pet. Br. 21) suggests an inference of greater state surrender of control over immunity under the Indian Commerce Clause than under the Interstate Commerce Clause. Finally, the "special responsibility" of the United States toward Indian tribes (U.S. Br. 24) tends, if anything, to confirm the lack of any distinct need for abrogation authority: that special responsibility should make it particularly easy for the United States itself to bring suits to protect tribal interests, as it long has done without Eleventh Amendment impediment (*Blatchford*, 501 U.S. at 783; *Arizona v. California*, 460 U.S. 605, 614 (1983)).

2. Union Gas *Should Be Overruled*

If the Court concludes that the Indian Commerce Clause cannot meaningfully be distinguished from the Interstate Commerce Clause for purposes of assessing congressional abrogation authority, then the Court should overrule *Union Gas* and hold that Congress lacks power under Article I to override States' sovereign immunity from suit in federal court. This Court has overruled numerous decisions, particularly in constitutional cases, where no strong reliance on the precedent had been built up, where the stable development of legal principles was not threatened, and where the reasoning of the precedent was out of step with related law and had been subject to persuasive criticism. *See Payne v. Tennessee*, 502 U.S. 808, 827-30 (1991). The Court's decision in *Union Gas* is a proper candidate for departure from *stare decisis*.

To begin with, we are aware of no substantial pattern of congressional reliance on the authority announced in *Union Gas*. Moreover, *Union Gas* has become ever more aberrational, in light of subsequent decisional law on related aspects of the protection of state authority against federal power, in its attribution of relatively little importance to state sovereignty in our federalist structure. *See, e.g., United States v. Lopez*, 63 U.S.L.W. 4343 (Apr. 26, 1995); *New York v. United States; Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Puerto Rico Aqueduct & Sewer Auth.*; *Dept. of Revenue v. ACF Industries, Inc.*, 114 S. Ct. 843, 850-51 (1994). Most strikingly, *Union Gas* comes with a special, perhaps unique, reason why the Court should undertake a fresh reconsideration of the merits of the question of congressional power: there is no rationale of the Court, or even of five Justices, supporting the holding in *Union Gas*, because Justice White, who provided the fifth vote for the result but did not join the plurality, specifically said that he disagreed with much of the plurality's reasoning and yet stated no rationale of his own. 491 U.S. at 56-57 (White, J., concurring in relevant part). The other four Justices, moreover, leveled severe criticisms at the plurality's reasoning. 491 U.S. at 30-42 (Scalia, J., joined by Rehnquist, C.J., O'Connor, J., and Kennedy, J., dissenting in relevant part). The central value supporting *stare decisis*—stability of legal principles—carries little weight where a case establishes no legal principles that could reasonably be relied on.

On reconsideration of the issue, congressional abrogation authority under Article I should be found lacking. As explained above, the notion of mutuality of state interests in the power to regulate interstate commerce lends some support to an inference of a structurally implicit surrender of immunity. But that notion is not in the end a sound enough basis for the suggested inference. For reasons set out in the dissent in *Union Gas*, there are much stronger considerations weighing against finding a

ceded power to Congress in Article I to override the sovereign immunity of States in Article III courts.

Perhaps most fundamentally, as a historical and structural matter, the outer limits of the "judicial power" have always been defined by Article III and have never been subject to expansion by Congress through its Article I power. That fundamental principle was established by this Court in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and in the long line of decisions growing out of *Hayburn's Case*. This Court has consistently adhered to the same fundamental principle that Article III sets the limits of the judicial power—limits that Congress was not authorized, by Article I, to expand. *See, e.g., Mesa v. California*, 489 U.S. 121, 136 (1989); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983); *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 607, 615-16 (1949) (opinion of Rutledge, J., joined by Murphy, J.); *id.* at 626-38 (opinion of Vinson, C.J., joined by Douglas, J.); *id.* at 646-55 (opinion of Frankfurter, J., joined by Reed, J.); *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809).[15]

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[15] Congress, in exercising its Article I power to create federal law, may bring a case *within* Article III limits by making it one properly "arising under" federal law. *See Verlinden B.V.*, 461 U.S. at 496. Although the quantum of substantive federal law Congress must create to achieve that result has been debated (*e.g.*, in discussing "protective jurisdiction"), *see Mesa*, 489 U.S. at 137-38, the very premise of that debate is the lack of any Article I power to expand Article III limits.

Similarly, the Court's decision in *Mistretta v. United States*, 488 U.S. 361 (1989), leaves undisturbed the longstanding recognition that Congress may not assign adjudicatory powers to the federal courts outside the limits set by Article III. The Court in *Mistretta* upheld an assignment of certain rulemaking functions to the Sentencing Commission, but only after taking care to stress that the Commission, though "located in the Judicial Branch," is not a court and does not purport to exercise the judicial power. *Id.* at 393.

This basic principle applies to the sovereign immunity at issue here. That immunity, this Court has held since *Hans v. Louisiana*, 134 U.S. 1 (1890), defines a limit on the reach of the "judicial power" granted by Article III. *See Pennhurst*, 465 U.S. at 98 ("this Court has recognized that [the Eleventh Amendment's] greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III") (quoting and citing prior decisions to same effect). Reading Article I to allow Congress to exceed that limit is no more justified than reading Article I to allow Congress to exceed other limitations on Article III power, including the limitation of subject matter jurisdiction to the categories enumerated in Article III or the limitation of power to "cases" or "controversies" or the limitation to the "judicial" function reflected in the Article III doctrine discussed in Argument I of this brief. *See Union Gas*, 491 U.S. at 39-40 (Scalia, J., dissenting in part).[16]

Adherence to this bedrock understanding of the relation of Article I and Article III authority is particularly important in the present context. After all, the (implied) Article III limit that the Tribe and the United States seek to allow Congress to override is one that, ever since *Hans* was decided, has been recognized as helping to define the essential structure of federalism under our Constitution. *See Pennhurst*, 465 U.S. at 99-100. That structure would be seriously weakened if protection of States' sovereign immunity were turned into a mere default rule, freely alterable by the federal government. *Union Gas*, 491 U.S. at 38 (Scalia, J., dissenting in part).

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[16] The plurality in *Union Gas* thought it significant that the Eleventh Amendment restricts only the "judicial power," not congressional authority. 491 U.S. at 18. But because Congress has no authority under Article I to expand the judicial power conferred by Article III, a limit on the judicial power implicit in Article III—such as sovereign immunity, as reflected in the Eleventh Amendment—automatically limits congressional authority under Article I.

Nor does the federal-state balance established by the Constitution require broad congressional abrogation authority under Article I for the vindication of the supremacy of federal law. Apparently, Congress did without Article I abrogation power until *Union Gas*. And the unquestioned doctrine of *Ex Parte Young* already ensures, without need of abrogation authority, that federal law can be vindicated against States on a prospective basis. Certainly, our constitutional system has not historically demanded the amenability of the federal government itself to suit (even for constitutional violations, substantively beyond congressional control). *See Union Gas*, 491 U.S. at 33-34 (Scalia, J., dissenting). Indeed, many if not all uniquely strong federal interests that might "require" suits against States in federal court can be protected through the ability of the United States itself to sue States in federal court, without impediment from the Eleventh Amendment. *See Blatchford*, 501 U.S. at 783.

Finally, Article I authority to abrogate States' immunity does not follow, logically or practically, from the holding of *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that Congress may abrogate such immunity under Section 5 of the Fourteenth Amendment. As a subsequent amendment, of course, the Fourteenth Amendment can alter pre-existing law and confer abrogation authority without remotely suggesting that the original Constitution conferred such power. And in inferring that the Fourteenth Amendment *should* be construed as adding a previously lacking power to Congress, it is powerfully relevant that the alteration at issue is a narrow one, restricted to specific topics where federal limits on state authority were peculiarly necessary. The alteration of the basic balance of state and federal authority reflected in the original preservation of States' sovereign immunity is accordingly a limited one, not the sweeping transformation of federal-state relations that would be wrought by a finding of broad abrogation authority under Article I. *See Union Gas*, 491 U.S. at 41-42 (Scalia, J., dissenting in part).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In The

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SEMINOLE TRIBE OF FLORIDA,

Petitioner,

v.

STATE OF FLORIDA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, WASHINGTON, ALABAMA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, HAWAII, IDAHO, KANSAS, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TEXAS, VERMONT, VIRGINIA AND WEST VIRGINIA SUPPORTING THE STATE OF FLORIDA, ET AL.

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INTEREST OF AMICI STATES

This case is more about federalism than about Indian tribes. Although the Parties are nominally an Indian tribe and a State, the conflict which brings the case to this Court is between the Congress of the United States and the governments of the several States of the Union. This case involves a statute which directly mandates State participation in a federal regulatory program and seeks to enforce that mandate through federal court action. In so doing, the statute offends the principles of federalism: the idea that we enhance our freedom by diffusing sovereign power "by the creation of two governments, not one." *United States v. Lopez*, ___ U.S. ___, ___, (Kennedy, J., concurring, slip op., at 11).

The sovereign interests of all the States of the Union – those with Indian lands within their borders *as well as* those without – are seriously jeopardized by the method chosen by the Congress to implement this legislation. The statute here directly commands the States to do certain acts, as if the States were mere subdivisions of a national government. No choice, incentive or acceptable alternative is given a State under this legislation. States must comply or face federal court orders.

Thus, the issues in this case go to the heart of our federal system of government – the relationship of States of the Union with the Federal Government and the autonomy of States to govern their own citizens.

SUMMARY OF ARGUMENT

Congress does not have the authority to abrogate State sovereign immunity under any of its Article I powers. The States, in creating the Union, did not agree to allow the federal Congress to create jurisdiction over them in suits brought by private parties against their consent.

The Eleventh Amendment of the United States Constitution is emblematic of the States' deeper sovereign immunity, part of the understood background against which the Constitution was adopted: without their consent, either expressly given or "inherent in the plan of the convention," States are immune from suit in federal courts. The immunity enjoyed by the States extends to all suits, regardless of the relief sought. *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, ___ U.S. ___, 113 S. Ct. 684, 688 (1993).

Petitioner, Seminole Tribe of Florida, asks the Court to reject that history and understood background of the Constitution, and to extend the limited holding of its 1989 plurality decision in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), to other Article I powers of Congress, so as to provide Congress with a unilateral authority to allow suits against States in federal courts by private citizens. Brief for Petitioner, at 17. This Court has never before accepted that view, nor should it now.

Amici States ask the Court to reject Petitioner's claim; to reaffirm that Article I, standing alone, does not grant Congress unilateral authority to abrogate State sovereign immunity – a separate waiver of State sovereign immunity is constitutionally required; and to restore the

Constitutional balance between federal and State authority "inherent in the plan of the [constitutional] convention" by overturning the 1989 plurality opinion of the Court in *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989). Certainly, the Court should reject the notion that the powers given the Congress over Indian affairs gives it authority to abrogate State sovereign immunity, immunity that this Court has recognized, as Petitioner concedes, was never surrendered to Indian tribes in the plan of the convention. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991).

The United States, appearing amicus curiae, contends Congress has the power to abrogate State sovereign immunity under the extensive plenary power that it has over Indian affairs, reflecting the erroneous assumption that a plenary power given the Congress includes the authority to subject States to suit in federal courts by private citizens. Brief for United States, at 24-25. The United States also argues, citing *Ex parte Young*, 209 U.S. 123 (1908), as its basis, that state officials can be sued in federal court for prospective injunctive relief under the Indian Gaming Regulatory Act of 1988 ("IGRA"), not merely to restrain an official from performing an unconstitutional act, but to compel the undertaking of any obligation imposed by federal law, without regard to the official's conduct or whether the obligation is discretionary.

Ex parte Young does not support the United States' contention. A litigant may not avoid the jurisdictional proscription of the Eleventh Amendment by the expedient of naming a state officer as a Defendant, when it is the State that is ultimately compelled to take action. In

fact, IGRA, by its own terms and in its practical effect, is directed at the State *qua* State. To the extent a suit is maintained against the governor of the State, or any other state officer, seeking to compel that officer to exercise the sovereignty of the State in its sovereign capacity, it is a suit against the State and is barred by the Eleventh Amendment. Finally, because IGRA directly coerces the States to negotiate and complete tribal-state gambling compacts and sanctions a lawsuit in federal court to compel this exercise of sovereign legislative discretion, it is a definitive example of a Tenth Amendment violation enforced by an Eleventh Amendment violation.

ARGUMENT

I.

ARTICLE I DOES NOT GRANT CONGRESS AUTHORITY TO ABROGATE STATE SOVEREIGN IMMUNITY.

In this case, the Court is presented with the novel assertion that Congress has unilateral authority to abrogate State sovereign immunity acting solely under the Indian Commerce Clause, an Article I power. This Court has never endorsed that view. The implications of the argument are far broader than the statute at issue here, or even Congress' specific authority under the Indian Commerce Clause, upon which IGRA is explicitly based. The assertion presupposes that any Article I power gives Congress the power to abrogate State sovereign immunity, abandoning the long-standing constitutional requirement of a separate waiver.

A. The States Entered Into The Union With Their Sovereignty Intact, Including Their Immunity From Suit As Sovereigns.

When the States entered into the Union, they did so with their sovereignty intact. *Blatchford v. Native Village of Noatak*, 111 S. Ct. at 2581. " 'The Constitution . . . leaves to the several States a residuary and inviolable sovereignty' . . . reserved explicitly to the States by the Tenth Amendment." *New York v. United States*, 505 U.S. ___, 112 S. Ct. 2408, 2434-35 (1992), *quoting The Federalist*, No. 39.

One of the most important aspects of that retained sovereignty is State sovereign immunity. For nearly two hundred years the analysis expressed by Alexander Hamilton in the Federalist, No. 81, guided this Court's determination of State sovereign immunity claims:

> It is *inherent in the nature of sovereignty*, not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the Government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the Convention, it will remain with the States[.]" (Emphasis added.)

1. The Eleventh Amendment Preserves State Sovereign Immunity.

Article III of the Constitution explicitly grants to the federal judiciary authority to adjudicate claims involving States in certain enumerated areas. The Eleventh Amendment just as explicitly limits that authority.

> This withdrawal of jurisdiction [in the Eleventh Amendment] effectively confers an immunity from suit. Thus this Court has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. Absent waiver, neither a State nor agencies acting under its control may be subject to suit in federal court.

Puerto Rico Aqueduct v. Metcalf & Eddy, 121 L.Ed.2d 605, 612 (1993) (citations omitted); *see also, Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984).

The Eleventh Amendment of the United States Constitution reflects the states' deeper sovereign immunity, which is itself "part of the understood background against which the Constitution was adopted, . . . " *Pennsylvania v. Union Gas*, 491 U.S. 1, 32 (1989) (Scalia, J., concurring in part and dissenting in part); *see also Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 487 (1987). Thus, the States, in creating the Union, did not contemplate federal jurisdiction over suits brought against them against their consent. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). Whether the Eleventh Amendment is wholly jurisdictional or more fundamentally tied to the question of a sovereign's consent, it is clear that its passage was the result of the "shock of surprise throughout the country" at the decision of the Supreme Court in *Chisholm v. Georgia*, 2 Dall. (2 U.S.) 419 (1793), permitting the suit against Georgia by a citizen of another State. The Amendment was proposed and ratified with "vehement speed," *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 708 (1949) (Frankfurter, J., dissenting), from March 4, 1793 to February 7, 1794.

In *Hans v. Louisiana*, the Court made it clear that the Eleventh Amendment's effect was to overturn the result in *Chisholm* and restore the "original understanding" that Article III's grant of federal court jurisdiction did not extend to suits against the States. *Hans*, 134 U.S. at 14-16. This original understanding supported the view that immunity flowed not from the Eleventh Amendment, but from broader concepts of state sovereign immunity generally.

> Behind the words of the constitutional provisions are postulates which limit and control. There is the . . . postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'

Monaco v. Mississippi, 292 U.S. 313, 322-323 (1934) (quoting A. Hamilton, *The Federalist*, No. 81).

2. States May Not Be Sued Unless Their Immunity Is Waived.

Reflecting the view that the state judicial immunity derives from a broader, general governmental immunity, it follows the immunity is a privilege that the State may waive at its pleasure. This may be done expressly, or impliedly, as suggested by the language of Alexander Hamilton: consent may be implied where there has been a "surrender of this immunity in the plan of the convention." *Monaco*, 292 U.S. at 323.

This surrender of immunity, or implied waiver, is found in the plan of the convention in suits against the

States by the United States because of the Supremacy Clause and because the allowance of such suits was inherent in the agreement to be bound by the Constitution. *United States v. Mississippi*, 380 U.S. 128, 140 (1965). Similarly, the states may sue each other since, inherent in the nature of a federated republic, is the idea that there should be a forum in which states can sue each other on an even footing. *Monaco*, 292 U.S. at 327-328; *South Dakota v. North Carolina*, 192 U.S. 286, 318 (1904).

Upon the adoption of the Fourteenth Amendment, a new source for the surrender or withdrawal of immunity appeared by virtue of the purpose and text of the Fourteenth Amendment – which was explicitly addressed to controlling State action – and necessarily limited the reach of the earlier adopted Eleventh Amendment. When acting pursuant to § 5 of the Fourteenth Amendment, Congress can annul, or abrogate, the States' sovereign immunity without the States' consent. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985), relying on *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). This authority, however, was still derived from a separate constitutionally-based surrender of State immunity – as the Court repeatedly noted in *Fitzpatrick*.

3. Abrogation Is An Analytical Corollary To A State's Waiver Of Immunity, Not A Separate Congressional Power.

"Waiver" has been the consistent hallmark of this Court's determination of State sovereign immunity claims. The *only* circumstance in which the Eleventh Amendment does not bar suits against a State in federal

court is where a State has consented to such a suit. *In Re State of New York*, 256 U.S. 490, 497 (1921).

It was in *Fitzpatrick* that the Court first used the word "abrogation" to express its view of the intersection of Congress' Article I authority to legislate in a given field and the federal judiciary's Article III authority to hear cases brought pursuant to such legislation. Implicit in the concept of congressional abrogation is not just delegation of federal authority to *legislate* in a particular sphere, however, but a surrender of State sovereignty to the *judicial* authority of the United States.

"Abrogation" has never been deemed by this Court as a separate power granted to Congress, as asserted by Petitioner. Brief for Petitioner, at 20. Rather, it is a shorthand expression used by the Court to express Congress' exercise of its power when coupled with a pre-existing, constitutionally-based *separate* waiver of State immunity. Such an "inherent waiver," albeit dormant, is given life when Congress speaks. There is no separate power to *abrogate* a retained right of the States. Rather, more properly speaking, Congress is enabled to make States liable to suit in federal court because of a preexisting, inherent waiver given to it by the States. Thus, any such power in Congress can go no further than the waiver that was initially made by the states "in the plan of the convention." When viewed in that light, it is clear that the States made no such broad-gauged waiver as is argued here, or as was suggested in *Union Gas*.

B. *Pennsylvania v. Union Gas* Represents A Radical Departure From Prior Case Law, Is Constitutionally Unsound, And Should Be Overturned.

In 1989, this Court, in a splintered and ambiguous plurality decision, decided that the power granted to the Congress in Article I of the Constitution to regulate interstate commerce was also a limitation on the sovereign immunity of a State, thereby allowing Congress to subject States to suit in federal court by private citizens. *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989). The premise of *Union Gas* was that Congress' power to regulate interstate commerce would be incomplete if Congress could not subject the States to suit in the federal courts. Amici States contend the *Union Gas* decision is constitutionally unsound and its rationale effectively eviscerates the Eleventh Amendment. To understand why *Union Gas* is constitutionally unsound it is necessary to review the intersection of Articles I and III of the Constitution.

1. The Jurisdiction Of The Federal Courts Is Determined By Article III, Not By Congress Under Article I.

The powers of Congress are set forth in Article I of the Constitution, the scope of judicial authority in Article III. Because of this separation, one branch may not expand or otherwise affect the inherent constitutional authority of any other branch. "[T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to

the crisis of the day." *New York, supra*, 112 S. Ct. at 2434. Although Congress is given the power to make laws, including the power to create causes of action under federal law, it cannot create jurisdiction in federal courts which is not otherwise established by Article III.

Petitioner's argument deviates from this established rule by suggesting that Congress can unilaterally create jurisdiction, secured by the Eleventh Amendment, whenever it legislates under its Article I authority. This construction skews both the balance of authority inherent in the federal structure of the Constitution and the balance of responsibilities between the federal judicial and legislative branches. It further ignores that

> Congress exercises its conferred powers subject to the limitations of the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment.

New York, supra, 112 S. Ct. 2408, 2418. This Court in *New York* continued by pointing to the limitation on the power of Congress found in the Tenth Amendment: "the power of the Federal Government is *subject to limits* that may, in a given instance, reserve power to the States." *Ibid.* Recently, this Court relied on the principles of federalism to invalidate an Act of Congress where the latter branch so interfered in State matters using its commerce clause powers that it "upset[] the federal balance," thereby bringing this Court to "recognize meaningful limits on the commerce power of Congress." *United States v. Lopez*, ___ U.S. ___, ___, (Kennedy, J., concurring, slip op., at 17).

Similarly, in *Blatchford* this Court found that the judicial authority in Article III is limited by State sovereign immunity as exemplified by the Eleventh Amendment. *Blatchford, supra*, 111 S. Ct. at 2581; *Accord Hans, supra*, 134 U.S. at 14-16; *Green v. Mansour*, 474 U.S. 64, 68 (1985); *Welch v. Texas Dep't of Highways & Public Trans.*, 483 U.S. at 487.

2. *Pennsylvania v. Union Gas* Should Be Overturned.

The fundamental error of *Union Gas* is its misapprehension of the relationship between the nature of Congress' Article I powers and the federal judiciary's Article III authority over the States. *Union Gas*, and the Indian Gaming Regulatory Act suits at issue in this case, represent *private rights of action against States*. It was the pursuit of precisely that remedy which the Eleventh Amendment was enacted to forbid.

There are numerous areas where Congress has the authority to legislate, and Congress has at its disposal a variety of mechanisms to encourage State compliance.[1] What Congress does not have the authority to do, however, is create a private right of action against a State to enforce a federal mandate, *without a separate waiver of State immunity*, either express or inherent. As the Court noted in Blatchford, just because the federal *government*

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[1] For example, Congress can restrict the availability of federal funds to States, or make them contingent upon an express waiver of State immunity; it can regulate directly in the absence of a State assertion of authority; and, in some circumstances, may even sue States directly to require compliance. See *New York, supra*, 112 S. Ct. at 2423.

can sue a State, does not mean that Congress can authorize *others* to do so. *Blatchford, supra*, 111 S. Ct. at 2584.

The premise of the 1989 plurality decision announced in *Union Gas* was that the Interstate Commerce Clause represented a surrender of State immunity "inherent in the plan of the Convention." There is no such waiver. *Union Gas* is the first and only time that this Court has found a constitutionally-based waiver of State sovereign immunity beyond that arising from state-federal and state-state relationships, and, by clear implication, in the Fourteenth Amendment. In so finding, *Union Gas* is a radical departure from the Court's previously uniform precedents regarding inherent waiver.

The plurality opinion in *Union Gas* also launched what has become an increasingly detailed search by litigants for other "implied" waivers of State immunity in diverse provisions of the Constitution, and herculean efforts to shoehorn legislation into the analytical niche created by the decision.[2] These pursuits have done serious damage to the fundamental balance of authority between the State and federal governments inherent in the structure of the Constitution.

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[2] The Amicus Brief of the National Indian Gaming Association typifies this effort. Although neither the Act nor its legislative history make any reference to interstate commerce, amici tribes contend that it "must have been on Congress' minds." The Eleventh Circuit properly rejected this line of argument. *Seminole Tribe of Florida v. State of Florida*, 11 F.3d 1016, 1027, n. 13 (11th Cir. 1994); *see* S.Rep. No. 446, 100th Cong., 2d. Sess. 1, p. 2 (1988); 25 U.S.C. §§ 2701(3), 2701(4), 2702(3).

As the Eleventh Amendment is a *limitation* on the Article III jurisdiction of the federal courts, Congress cannot change that limitation through the exercise of Article I powers. This is an appropriate case in which to abandon the plurality decision in *Union Gas*. At a minimum, this case presents an opportunity to confine *Union Gas* to its facts and not to extend its reach. Otherwise, the Eleventh Amendment is transformed from a constitutional wall to a statutory hurdle, easily cleared by congressional recitation of a "clear" intent to abrogate the States' sovereign immunity.[3] That is not what the framers of the Constitution, or the States which ratified it, intended.

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[3] One example is the passage last fall of amendments to Section 106 of the Bankruptcy Code which were explicitly directed at overturning this Court's earlier holding in *Hoffman v. Conn. Dept. of Income Maintenance*, 492 U.S. 96 (1989). Those revisions, which are to be applied *retroactively* allow a private individual to force a state into a federal bankruptcy court anywhere in the country to defend enforcement and collection activities that were fully legal at the time they took place. The difficulties this imposes on state governments is exacerbated by the short notice periods in bankruptcy cases and the financial strains of defending out-of-state litigation. As such, the States are highly vulnerable to frivolous or bad faith filings by parties who challenge *bona fide* actions of the state simply in the hope that the States will be unable to defend themselves adequately. For that reason, we suggest that this Court must consider carefully the ramifications of upholding the rationale of *Union Gas*, particularly if that rationale is given an expansive reading that could be expanded to other Article I powers such as the Bankruptcy Clause.

II.

EVEN UNDER *UNION GAS*, CONGRESS DOES NOT HAVE THE POWER TO ABROGATE STATE JUDICIAL IMMUNITY UNDER THE INDIAN COMMERCE CLAUSE.

Even if the Court chooses not to address *Union Gas* in the context of this case, the reasoning of that case does not logically extend to the Indian Commerce Clause. As Petitioner acknowledges, Florida did not expressly waive its sovereign immunity and the Indian Commerce Clause contains no such inherent waiver. Brief of Petitioner, at 16, citing *Blatchford*, 501 U.S. at 779. The Indian Commerce Clause does not, therefore, represent a waiver of State immunity empowering Congress to make States liable to private litigation in federal court.

This Court's conclusion in *Blatchford* that there was no *waiver* of sovereign immunity "inherent in the plan of the convention,"[4] is a compelling answer to why Congress does not have the power to *abrogate* state sovereign immunity under the Indian Commerce Clause. States did

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[4] What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States [citation omitted], as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender *the tribes'* immunity for the benefit of the *States*, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 111 S. Ct. at 2582-83, emphasis in original.

not contemplate granting Congress power to nullify an immunity which they did not intend to surrender, nor did the States contemplate that Congress would have the power to compel the States to perform acts wholly within the scope of federal responsibility.

This Court has not previously found congressional power to abrogate state sovereign immunity when legislating pursuant to the power to regulate commerce with Indians. Nevertheless, several Circuit Courts have done so, citing *Union Gas* as their authority. The Eighth, Ninth and Tenth Circuits found the power of Congress to abrogate state sovereign immunity under the *Interstate* Commerce Clause is equally "applicable" to the *Indian* Commerce Clause prong. *Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273, 280-281 (8th Cir. 1993); *Spokane Tribe of Indians v. Washington State*, 28 F.3d 991, 996 (9th Cir. 1994); *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422, 1430 (10th Cir. 1994). The Ninth Circuit went further and suggested that the *Union Gas* plurality framed its analysis in terms of the "Commerce Clause" as a whole, and did not limit it to the Interstate Commerce Clause prong. In contrast, the Eleventh Circuit in this case correctly noted that the *Union Gas* Court, in each of its opinions – plurality, concurrences and dissents – addressed *only* the interstate prong, and that its rationale goes only to the regulation of commerce *among the States*. *Seminole*, 11 F.3d at 1027.

A. Plenary Power Alone Does Not Give Congress The Power to Abrogate State Sovereign Immunity.

Amicus Curiae United States rests its application of *Union Gas* to the Indian Commerce Clause on the notion that that clause embodies a plenary power of the Congress that limits the power of the states, citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (finding congressional power to abrogate under § 5 of the Fourteenth Amendment), and *Union Gas*, 491 U.S. at 19 (plurality opinion) (like the Fourteenth Amendment, the "Commerce Clause withholds power from the States at the same time as it confers it on Congress.") Brief for United States, 20-21. Under this reasoning, of course, any Article I power granted to the Congress by the States in the Constitution – since all arguably withhold power from the States in some way – would serve as a basis for congressional power to abrogate state sovereign immunity – rendering the Eleventh Amendment superfluous. It was just such an analysis that Justice Scalia cautioned against in his partial dissent in *Union Gas*:

> [I]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers. An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to render the doctrine a practical nullity and is therefore unreasonable.

Pennsylvania v. Union Gas, 491 U.S. at 42 (Scalia, J., concurring in part and dissenting in part).

However, only the Fourteenth Amendment and, arguably, the Interstate Commerce Clause provide any

rationale for abrogation. First, they explicitly limit the autonomy of State governments to take certain actions and provide for federal supremacy relating to those particular activities. Second, without conceding the wisdom of *Union Gas*, the plurality in that case expressed an important limitation on the power of Congress to summarily override a state's Eleventh Amendment immunity: the power to abrogate was found to exist only because Congress' power *would be incomplete* without rendering the States themselves liable in federal court. *Union Gas, supra*, 491 U.S. at 15, and at 19-20; *see also Fitzpatrick*, 427 U.S. at 456 (Congress' power to enforce the Fourteenth Amendment would be incomplete without the power to make the States, as employers, *liable in federal court* for unlawful employment discrimination: "Congress may . . . provide for private suits against States or state officials which are constitutionally impermissible in other contexts."). The same cannot be said about the Indian Commerce Clause. Congress' authority over Indian relations is *complete*, and need not involve the States at all.

B. Displacement Of States' Power Does Not Give Congress Power *Over* States.

The Indian Commerce Clause was not intended to affect the autonomous operation of a State government. Fulfilling a different purpose than the interstate commerce prong, it allocated the responsibility for that activity to the United States government.[5] While the plenary

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[5] The Eleventh Circuit below recognized the important distinctions in the respective purposes of Interstate Commerce Clause and the Indian Commerce Clause, noting the distinctly different purposes behind each clause:

> In [*Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192], the Court acknowledged the plenary powers under the Interstate Commerce Clause that allow Congress to place limits on the states [was] in order to "maintain[] free trade among the States." *Id.* By contrast, "the central function of the Indian Commerce Clause is to provide Congress with power to legislate in the field of Indian affairs. *Id.* Although Congress has the power to limit the states under the Indian Commerce Clause as well, the different purposes underlying the two clauses mandate they be treated distinctly.

Seminole Tribe v. Florida, 11 F.3d at 1027.

power of the Congress with respect to Indian affairs may *displace* the power of the States with respect to Indians, the Indian Commerce Clause does not permit Congress to mandate the States to assume the federal government's responsibilities with respect to Indian tribes – its displacement of the States simply leaves the States out of the matter. Nor does the Clause provide the power to abrogate state sovereign immunity to compel a State to perform an act otherwise solely within the scope of the federal government's responsibilities. This use of the federal courts to compel the States' performance offends not only the Eleventh Amendment, but also the Tenth Amendment, as discussed below.

To date, this Court has found Congress' power to abrogate only in Section 5 of the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445, and in the *Interstate* Commerce Clause, *Union Gas*, 491 U.S. 1. The significance of finding yet another constitutional provision that gives

the Congress power to abrogate state sovereign immunity, one that permits the courts to compel States to perform certain acts, cannot be understated – it would lead to a critical undermining of the federal system of government and further strengthen the power of the federal government at the expense of the states. *Delmuth v. Muth*, 491 U.S. 223, 227-28 (1989).

III.

EX PARTE YOUNG IS NOT AUTHORITY FOR AN ORDER COMPELLING A GOVERNOR TO EXERCISE THE SOVEREIGNTY OF THE STATE FOR THE SOLE PURPOSE OF EFFECTUATING A FEDERAL REGULATORY SCHEME.

Amicus curiae United States argues that *Ex parte Young*, 209 U.S. 123, permits a suit against a state official who is assertedly required under IGRA to negotiate with Indian tribes for class III gaming. Brief of the United States, at 12. This reliance on *Ex parte Young* is manifestly misplaced, for nothing in that decision, or any successor decisions by this Court, has ever suggested that the Eleventh Amendment does not bar a federal court from *compelling* the exercise of state sovereign powers in the first instance.

In *Ex parte Young*, plaintiff railroad stockholders brought an unsuccessful action to enjoin Young, the state attorney general, from enforcing a state law alleged to be unconstitutional. The question presented by *Young* was essentially this: Is a suit against the State's attorney general seeking to restrain unconstitutional conduct tantamount to a suit against the State itself for purposes of the

Eleventh Amendment? In answer to that question, this Court determined that, where a state actor's conduct is unconstitutional, the official is "stripped" of the mantle of state sovereignty and, therefore, neither the suit nor any consequent order requiring the state actor to bring his conduct into conformity with the Constitution offends the Eleventh Amendment. *Ex parte Young*, *supra*, 209 U.S. at 159-160; *see also, Pennhurst, supra*, 465 U.S. at 102.

The successors to *Ex parte Young* that are relied on by the Solicitor General thus concern the inquiry whether an order mandating prospective conduct by a state actor is tantamount to an order against the State itself. In each of those cases, the Court determined that the order was not against the State for purposes of the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (public assistance benefits); *Milliken v. Bradley*, 433 U.S. 267 (1977) (expenditure of public funds to remedy effects of past *de jure* segregation); *Quern v. Jordan*, 440 U.S. 332 (1979) (notice to class members of retroactive relief).)

In this case, however, there can be no reasonable doubt that a suit under 25 U.S.C. § 2710(d)(7)(B) is *necessarily* and *always* a suit against the State itself. Whether or not *Ex parte Young* and its progeny permit orders compelling affirmative conduct by state actors, no decision of this Court has ever read *Ex parte Young* to suggest that an order compelling a state officer to exercise the sovereignty of the State is permissible under the Eleventh Amendment.

Whoever may be the nominal defendant, a suit under IGRA is necessarily directed against the State in its sovereign capacity.[6] As a threshold matter, the statute on its face expressly states that an order issuing from any suit brought under IGRA is directed against *the State itself.* 25 U.S.C. § 2710(d)(7)(B)(iii). Indeed, such a suit *must* be directed against a State in its sovereign capacity, because, under IGRA, a tribal-state compact addresses issues related to the scope and extent of state police power on Indian lands within the State. 25 U.S.C. § 2710(d)(3)(C). Accordingly, an order directing a State "to conclude a compact," 25 U.S.C. § 2710(d)(7)(B)(iii), is necessarily an order compelling an unwilling State to exercise *sovereign powers.*[7]

Therefore, even if an order under IGRA is nominally issued against a state governor or any other nominal defendant chosen by the Tribe, rather than against the State itself, it is necessarily presumed that that officer exercises the sovereignty of the State vis-à-vis Indian Tribes and that that officer, therefore, has the power to negotiate and bind the State in a compact defining the extent of the State's sovereignty over lands within its

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[6] Petitioner named the State of Florida in this suit, in addition to Governor Lawton Chiles.

[7] In contrast, the orders issued in *Ex parte Young* and successor decisions of this Court sought to compel a state actor, *who is already exercising state governmental powers,* to bring his conduct into conformity with federal law. Thus, in the language of *Ex parte Young,* an injunction lies to "restrain" or to "prevent" the state actor from doing that which he has no right to do. *Ex parte Young,* at 159.

boundaries.[8] The order would be pointless otherwise. However, inasmuch as a suit against a state governor or other official under 25 U.S.C. § 2710(d)(7)(B) is a suit to compel the governor to exercise the sovereignty of the State, it is necessarily a suit against the State in its sovereign capacity and is therefore barred by the Eleventh Amendment.

IV.

THE TENTH AMENDMENT PROHIBITS APPLICATION OF THE COERCIVE PROVISIONS OF THE INDIAN GAMING REGULATORY ACT

In IGRA, Congress directly commands the States to exercise their sovereignty by negotiating and implementing a tribal-state compact once requested by a tribe. Such a command deprives the States of their sovereign role, in violation of the Tenth Amendment. Under the Act, an Indian tribe retains the sovereign prerogative to request state participation in the regulation of gaming activities on Indian lands. 25 U.S.C. § 2710(d)(1)(C). If an Indian tribe requests a State to negotiate for a compact concerning class III gaming, the State "*shall* negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A) (emphasis added). The federal government, while it has broad plenary authority for Indian affairs, assumes minimal responsibility under this

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[8] Contrary to the suggestion of the Solicitor General, an order compelling a governor to exercise the sovereignty of the State cannot reasonably be characterized as an order compelling a "ministerial" act.

law for the formulation or implementation of a regulatory scheme for serious Indian gaming.

The *coercive* elements of 25 U.S.C. § 2710(d)(3), *require* States to negotiate, under pain of federal court compulsion. They reduce the States to mere administrative subdivisions of the Federal Government and do injury to their sovereignty. IGRA requires the States to exercise their sovereign discretion and carry out duti[illegible] which the federal government has chosen not to undertake. As this Court most recently reaffirmed in *New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408 (1992):

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. . . . The Constitution instead leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment.

112 S. Ct. at 2434 (citations omitted).

The federal government may not *compel* a State to regulate in an area of federal responsibility. Indeed, "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." 112 S. Ct. at 2429 (emphasis added). When it comes to handling certain affairs, the States expressly vested in *Congress* responsibility for regulating commerce "with foreign nations, and among the several states, and with the Indian tribes." U.S. Const., art. I, § 8, cl. 3. Article I of the Constitution does not authorize Congress to avoid its obligation by forcing the several States to assume responsibility for handling Indian affairs.

Instead, Congress chose to compel a state to negotiate a tribal-state compact under 25 U.S.C. § 2710(d)(3)(A), at the request of a tribe; to subject that state to being hauled into federal court under a claim that it failed to negotiate in good faith under 25 U.S.C. § 2710(d)(7); to subject the state to the compulsion of a federal court order to further negotiate; to subject the state to compulsion to submit a last best offer to a court-appointed mediator; and to require the state to make a selection from the mediator. 25 U.S.C. § 2710(d)(7).

Congress may, of course *encourage* the aid of the States in regulating the conduct of gaming activities on Indian lands. *Red Lake Band of Chippewa v. Swimmer*, 740 F. Supp. 9, 13-14 (D.D.C. 1990), *aff'd*, *Red Lake Band of Chippewa v. Brown*, 928 F.2d 467 (D.C. Cir. 1991). Under Congress' spending power, it may encourage a state to regulate in a certain way, short of outright coercion, by attaching conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1936). Where Congress has the authority to regulate private activity under the Interstate Commerce Clause, Congress may offer States the choice of regulating that activity according to federal standards or having state law preempted by federal regulation. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981); see also *FERC v. Mississippi*, 456 U.S. 742 (1982) (where States are encouraged to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply). Where Congress encourages state regulation rather than compelling it, "state governments remain responsive to the local electorate's preferences; state officials remain accountable to

the people." *New York v. United States*, 112 S. Ct. at 2424. No such incentive is present under IGRA.

As with the coercive "take title" provision in the Low-Level Radioactive Waste Policy Amendments Act of 1985, Public Law 99-240, 99 Stat. 1842, 42 U.S.C. § 2021b et seq., struck down by the Court in *New York v. United States*, 112 S. Ct. at 2408, IGRA's scheme unconstitutionally coerces States into participation in IGRA by holding out two impermissible choices, two coercive applications of federal law: "the State *shall* negotiate with the Indian tribe," 25 U.S.C. § 2710(d)(3)(A), or else face litigation in federal court, 25 U.S.C. § 2710(d)(7)(A) – with the additional coercive processes of forced negotiations, 25 U.S.C. § 2710(d)(7)(B)(iii); mediation, 25 U.S.C. § 2710(d)(7)(B)(iv); and ultimately, of imposition of a federally prescribed regulatory system which may compel the state to create a system for regulating a game that is illegal within that state, 25 U.S.C. § 2710(d)(7)(B)(vii).

Nor does IGRA merely provide "encouragement," as opposed to a mandate, to achieve "cooperative rulemaking" with the tribe. IGRA, by its own terms, imposes a requirement on the states to fashion, implement and enforce a regulatory program which the federal government has not done itself. This constitutes a direct interference with the states' sovereign reserved powers to contract. *United States v. Bekins*, 304 U.S. 27 (1938). It is a direct commandment to the states to engage in a regulatory process or face the prospect of being sued in federal

court, with all of the attendant costs and risks associated with litigation.[9]

Nor are IGRA's remedial provisions a set of "default provisions," which leave a "choice" for States. A State's mere "choosing" to not negotiate must necessarily result in a court finding that the State is *in bad faith* before the mediational procedures ensue to the Tribes' benefit. Then, the State ignores at its peril a court order to *complete* a compact within a 60-day period. *States submitting themselves to being adjudged to be in bad faith and ignoring federal court orders at their own peril is not a legitimate choice nor would it be a responsible exercise of the State's sovereign authority and its legislative discretion.*

Finally, when Congress conscripts states into fashioning and implementing a regulatory scheme to achieve federal ends, congressional representatives avoid political accountability. In IGRA, the scheme created by Congress minimizes the accountability of federal officials to the public. The legislation mandates that the States "work it out" with the tribes. It is thus the *State* officials who must bear the brunt of public disapproval, while congressional representatives – and, of course, the Secretary of the Interior, who ultimately approves the regulatory scheme,

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[9] If IGRA only "encourages" "cooperative rulemaking," and compliance with IGRA's negotiation provisions is voluntary, then there would be no Article III "case or controversy" in IGRA cases. If the States do not negotiate in a voluntary arrangement, that is the end of the matter – there is then no controversy for the court to adjudicate, no need for orders to negotiate and mediate, and no reason for Article III courts to declare the rights of tribes to negotiate with an unwilling partner.

25 U.S.C. § 2710(d)(8) – remain insulated from the political consequences of the conduct of gaming on Indian lands. As Justice Kennedy noted in *United States v. Lopez*, ___ U.S. ___, federalism " 'serves to assign political responsibility, not to obscure it.' " (Kennedy, J., concurring, slip op., at 13), quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). The result here leaves us unable to hold either branch of our dual federal-state government properly answerable to the citizens. *Id.*, at 13.

The States did not authorize Congress to impose upon them responsibility for determining the conditions under which casino gambling will be conducted on Indian lands within the State. Congress may either regulate such gambling directly, or Congress may permit the tribes to regulate such gambling exclusively; within either option, Congress may *invite* the States to undertake regulation of the activity in lieu of direct federal or tribal regulation. Such a scheme ensures the electoral accountability of federal and state officials, as the case may be, for the decisions made concerning the regulation of casino gambling on Indian lands. But Congress may not shield itself and federal officials from accountability for the conduct of casino gambling on Indian lands by making state officials responsible for fashioning the regulatory scheme – under threat of suit by Indian tribes who have no accountability to the electorate.

CONCLUSION

For the reasons stated here, the judgment of the Court of Appeal should be affirmed on the issues presented.

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